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Negligence, Contract, and Architects' Liability for Economic Loss

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I. INTRODUCTION

Should an architect be liable when her mistakes increase a contractor's costs of construction? Should tort principles answer this question?

In a trend developing over the last two decades, an increasing number of states[1] allow a contractor to sue the owner's architect[2] in negligence solely for economic loss[3] caused by defects in architectural plans or specifications or by the architect's negligent performance of other tasks during the course of a construction project.[4] Contractors' negligence

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[1] *See infra* part II.A.

[2] "Contractor" refers to someone who enters into a contract with an owner to build a project. The term "architect" refers to architects as well as engineers and any others who perform similar services. Hence, "design professional" is an apt but cumbersome synonym. "Owner" refers to the entity that contracts with others to design and build the project. "Owner's architect" means simply an architect under contract with the owner.

[3] These negligence suits seeking economic recovery are to be distinguished from suits which also seek to recompense personal injury or property damage.

[4] Courts often call these tasks "supervision." They can encompass virtually any activity undertaken by the architect during the course of the project other than preparation of the plans and specifications. However, "supervision" can be misleading to the extent that it implies a definite set of duties. In practice, an owner might hire an architect to do any number of specific tasks during construction of the project, including some that

claims[5] against architects have become a routine part of construction disputes and thus comprise a facet of the perceived tort liability crisis confronting professionals. The significance of these negligence claims is that although many jurisdictions generally bar negligence or products liability suits unless the plaintiff has suffered personal injury or property damage, contractors routinely recover purely economic loss in negligence suits against architects. Thus, this Article examines a significant exception to the economic loss rule.[6]

Naturally, when faced with a loss, a contractor will embrace relief from any available source. The important questions, however, are whether the contractor should be afforded a remedy, *ex ante*, and, if so, whether a tort action for negligence is the appropriate remedy. In confronting these questions, this Article makes particular use of the two judicial opinions that gave birth to the negligence action: *United States* ex rel. *Los Angeles Testing Laboratory v. Rogers & Rogers*[7] and *A.R. Moyer, Inc. v. Graham*.[8]

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involve overseeing or supervising the work of the contractor and some that do not. Moreover, the division between supervision and design work is not always sharp, as when an architect interprets plans or designs changes during the course of a project. What is important to remember is that all such duties arise only from the contract between the owner and the architect.

[5] Excluded from this paper are cases concerning an architect's liability as arbitrator of disputes between the owner and the contractor. Based on an analogy to judicial immunity, an architect is not liable for the adverse consequences of its decisions as arbitrator, absent bad faith. *See* STEVEN M. SIEGFRIED, INTRODUCTION TO CONSTRUCTION LAW 137-38 (1987).

[6] The economic loss rule, which is usually traced to Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303, 309 (1927), refers to the prohibition against recovery in negligence or products liability for purely economic loss, as distinguished from loss traced to personal injury or property damage. Although many commentators have framed the issue as whether tort doctrine should permit recovery for losses that are solely economic, the problem defies a unitary solution. *See* Gary T. Schwartz, *Economic Loss in American Tort Law: The Examples of* J'Aire *and of Products Liability*, 23 SAN DIEGO L. REV. 37, 38 (1986). *But see* William Bishop, *Economic Loss in Tort*, 2 OXFORD J. LEGAL STUD. 1 (1982); William Bishop & John Sutton, *Efficiency and Justice in Tort Damages: The Shortcomings of the Pecuniary Loss Rule*, 15 J. LEGAL STUD. 347, 369 (1986); Robert L. Rabin, *Tort Recovery for Negligently Inflicted Economic Loss: A Reassessment*, 37 STAN. L. REV. 1513, 1538 (1985); Mario J. Rizzo, *A Theory of Economic Loss in the Law of Torts*, 11 J. LEGAL STUD. 281, 283-85 (1982).

[7] 161 F. Supp. 132 (S.D. Cal. 1958) [hereinafter *Rogers & Rogers*]; discussed *infra* notes 19-27 and accompanying text.

[8] 285 So. 2d 397 (Fla. 1973) [hereinafter *Moyer*]; discussed *infra* notes 28-33 and

The discussion proceeds as follows. Part II sets out the relevant cases. Part II.A. outlines the approaches taken in *Rogers & Rogers*, *Moyer*, and other cases allowing contractors to recover for economic loss in negligence suits against architects.[9] Part II.B. analyzes the precedent–consisting mainly of personal injury cases–underlying the decisions discussed in Part II.A. and concludes that the precedent does not compel recognition of a negligence action by contractors against architects for economic injury.[10] Part II.C. discusses a noteworthy anomaly: some states that typically enforce the economic loss rule as a general prohibition against negligence or products liability recovery for purely economic injury exempt contractors who sue architects.[11] Part II.D. considers those judicial opinions that have rejected claims similar to the ones presented in *Rogers & Rogers* and *Moyer*.[12] Part II.E. concludes the preliminary examination of the cases by briefly sketching contract remedies that present alternatives for redressing injuries such as those alleged in *Rogers & Rogers* and *Moyer*.[13]

Part III generally discusses important problems with negligence liability. Part III.A. illustrates how negligence liability provides unsatisfactory incentives with regard to a contractor's delay damages and can interfere with attempts to allocate the costs of delay by contract, as well as how those contractual allocations may be more efficient.[14] Part III.B. demonstrates how imposing liability on the architect for negligent performance of supervisory tasks set out in the contract between the owner and the architect can reallocate risks that the parties had divided by contract, thereby skewing multilateral contractual arrangements and, essentially, forcing the parties to accept inefficient contract terms.[15] Part III.C. discusses how negligence liability provides an undesirably vague standard by which to judge the architect's performance.[16] Part III.D. addresses two common arguments in support of extending a negligence remedy. Along the way, Part III examines key provisions of industry form contracts in order to evaluate how these documents address the issues. Part IV offers some concluding remarks on the redundant and inferior nature of negligence principles in this context.

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accompanying text.

[9] *See infra* notes 17-39 and accompanying text.

[10] *See infra* notes 40-54 and accompanying text.

[11] *See infra* notes 55-80 and accompanying text.

[12] *See infra* notes 81-89 and accompanying text.

[13] *See infra* notes 90-97 and accompanying text.

[14] *See infra* notes 105-21 and accompanying text.

[15] *See infra* notes 122-46 and accompanying text.

[16] *See infra* notes 147-52 and accompanying text.

II. THE CASES

A. The Negligence Approach

Courts which permit tort recovery for a contractor under a negligence theory do so on the basis of a simple syllogism.

> Privity of contract generally is not a bar to negligence recovery.
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> In prior cases, liability attached when negligence caused foreseeable injury.
>
> Therefore, when an architect's negligence foreseeably injures a contractor, liability should attach.

This approach was developed in, and is aptly illustrated by, the two leading cases permitting recovery for purely economic loss: *United States* ex rel. *Los Angeles Testing Laboratory v. Rogers & Rogers*[17] and *A.R. Moyer, Inc. v. Graham*.[18]

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[17] 161 F. Supp. 132 (S.D. Cal. 1958).

[18] 285 So. 2d 397 (Fla. 1973). *Moyer* is the prominent authority in most states that recognize the cause of action. *See, e.g.*, E.C. Ernst, Inc. v. Manhattan Constr. Co., 551 F.2d 1026, 1032 (5th Cir. 1977), *cert. denied*, 434 U.S. 1067 (1978) (applying Alabama law); Owen v. Dodd, 431 F. Supp. 1239, 1242 (N.D. Miss. 1977) (applying Mississippi law); M.J. Womack, Inc. v. House of Representatives, 509 So. 2d 62, 72 (La. Ct. App.), *writ denied*, 513 So. 2d 1208 (La.), *writ denied*, 513 So. 2d 1211 (La. 1987); Bacco Constr. Co. v. American Celloid Co., 384 N.W.2d 427, 433 (Mich. Ct. App. 1986); Magnolia Constr. Co. v. Mississippi Gulf S. Eng'rs, Inc., 518 So. 2d 1194, 1202 (Miss. 1988); Conforti & Eisele, Inc. v. John C. Morris Assocs., 418 A.2d 1290, 1291 (N.J. Super. Ct. Law Div. 1980), *aff'd*, 489 A.2d 1233 (N.J. Super. Ct. App. Div. 1985). In *Conforti & Eisele*, the New Jersey Court noted that New Jersey has generally eliminated privity as a bar to a negligence action and that recovery for personal injuries has already been permitted. Consequently, "extending liability for economic injury [was] the next logical step." *Id.* at 1292.

Other cases cite to both *Moyer* and *Rogers & Rogers*. *See, e.g.*, Detweiler Bros. v. John Graham & Co., 412 F. Supp 416, 419 (E.D. Wash. 1976) (relying on *Moyer* and *Rogers & Rogers* in applying Washington law and holding that a subcontractor may sue owner's architect for negligent supervision of construction); Forte Bros. v. National Amusements, Inc., 525 A.2d 1301, 1303 (R.I. 1987); I.O.I. Sys., Inc. v. City of Cleveland, Texas, 615 S.W.2d 786, 790 (Tex. Civ. App. 1981) (finding no negligence on the facts); Shoffner Indus. v. W.B. Lloyd Constr. Co., 257 S.E.2d 50, 55-56 (N.C. Ct. App.), *review denied*, 259 S.E.2d 301 (N.C. 1979). The *Shoffner* decision was premised largely on the "well settled" North Carolina rule that "where a contract between two parties is intended for the benefit of a third party, the latter may maintain an action in contract for its breach or in tort if he had been injured as a result of its negligent performance." 257 S.E.2d at 55. The opinion is somewhat opaque, however, concerning the extent to which the

In *Rogers & Rogers*, a building contractor named Rogers & Rogers undertook to build a school through a contract with the United States. As part of the construction process, the contractor fabricated the skeleton of the building out of substandard concrete.[19] When a local government agency refused to approve the skeleton, which was required by law in order for the school to be able to obtain a permit to open, the architect ordered the contractor to stop work on the project and correct the problem at the contractor's expense.[20]

The contractor later sued the architect in tort to recover the cost of replacing the skeleton and to recover delay damages.[21] Essentially, the contractor claimed that the architect performed certain "supervisory" tasks negligently, the most notable one being the approval of the faulty concrete.[22] The architect argued that the United States was the only other party to the contract that imposed the supervisory duties and, therefore, the United States was the only party to whom the architect owed a legal duty.[23]

In response, the court employed the syllogism described above. First, the court summarily noted that California no longer followed the common law rule that only those in contractual privity may sue for the negligent performance of a duty imposed by a contract.[24] Then, drawing an analogy to prior negligence cases imposing liability, the court decided that the architect's control over the prime contractor ought to render the architect liable.[25] The court found the following:

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characterizations of the loss as property damage and of the architect's duties as supervisory were necessary in allowing the suit. These characterizations were important in the court's attempt to distinguish apparently contrary precedent from the North Carolina Supreme Court.

[19] The concrete was used to make bents, "pre-formed [truss-like] structures which when hoisted into place to form the skeleton of the building." *Rogers & Rogers*, 161 F. Supp. at 135.

[20] *Id.* at 134.

[21] *Id.* at 134. Procedurally, the testing laboratory and the concrete supplier sued the contractor in the name of the United States in order to recover balances due them under their contracts with the contractor. The contractor counterclaimed, adding the architect as a party defendant. *Id.* at 133.

[22] *Id.* at 135. Specifically, the contractor claimed that the architect negligently interpreted reports of tests on the faulty concrete that were prepared by a testing company that the architect had designated and the contractor had retained. The contractor also claimed that the architect negligently approved the bents and negligently authorized or ordered the bents to be incorporated into the building. *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.* at 135-36.

> [T]he architect was contractually obligated to the United States to prepare plans and specifications for and supervise the construction of the school building involved. This record further shows beyond dispute that under the prime contractor's agreement with the Government the architect had not only the general supervision and direction of the work, but also the authority to stop the work whenever that might be necessary to insure specified performance.[26]
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> . . . .
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> [T]he position and authority of a supervising architect are such that he ought to labor under a duty to the prime contractor to supervise the project with due care under the circumstances, even though his sole contractual relationship is with the owner. . . . Altogether too much control over the contractor necessarily rests in the hands of the supervising architect for him not to be placed under a duty imposed by law to perform without negligence his functions as they affect the contractor. The power of the architect to stop the work alone is tantamount to a power of economic life or death over the contractor. It is only just that such authority, exercised in such a relationship, carry commensurate legal responsibility.[27]

In the other leading case, *A. R. Moyer, Inc. v. Graham*,[28] Moyer, a prime contractor, sued Graham, the owner's architect, alleging negligent preparation of plans and specifications and negligent performance of various supervisory tasks.[29] In allowing Moyer to recover on both

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[26] *Id.* at 134.

[27] *Id.* at 134-36. The court continued:

> The fact that the architect is retained by the United States makes no difference. Indeed, this circumstance increases the need for exercise of due care by the architect in his actions affecting the contractor, because the Government usually is in an even stronger position than others to insist that the work be done strictly according to specifications and that the contractor bow to the supervision of the architect.

Id. at 136.

[28] 285 So. 2d 397 (Fla. 1973).

[29] *Moyer*, 285 So. 2d at 398. The case came before the Florida Supreme Court on questions certified to it by the Fifth Circuit Court of Appeals. A. R. Moyer, Inc. v. Graham, 443 F.2d 434, 436 (5th Cir. 1971). The basic question asked by the Fifth Circuit was whether a general contractor could maintain a direct action against an Architect or Engineer where there was an absence of privity between the parties. The Fifth Circuit further asked the Florida Supreme Court whether its opinion would differ if:

negligence claims,[30] the court tracked the approach taken by the *Rogers & Rogers* court.[31] The *Moyer* court observed that in Florida privity is no barrier to negligence recovery. Rather, the general rule in Florida is that negligence causing foreseeable injury creates liability.[32] Since the architect could easily have foreseen the contractor's injury, general negligence principles held the architect liable.[33]

(a) The Architect or Engineer, or both, were negligent in the preparation of the plans and specifications.

(b) The Architect or Engineer, or both, negligently caused delays in preparation of corrected plans and specifications.

(c) The Architect or Engineer, or both, were negligent in preparing and supervising corrected plans and specifications.

(d) The Architect or Engineer, or both, were negligent in failing and refusing to provide the general contractor with final acceptance of the building project in the form of an Architect Certificate upon the completion of the building.

(e) The Architect or Engineer, or both, undertook to exercise control and supervision over the general contractor in the performance of his duties to construct the building project.

(f) The Architect or Engineer, or both, negligently exercised control and supervision over the general contractor.

Id.

[30] *Moyer*, 285 So. 2d at 402. The court expressly allowed actions for both negligent design and negligent supervision, and for direct and delay damages. *Id.*

[31] The *Moyer* court relied heavily and expressly on *Rogers & Rogers*. *Id.* at 401 (quoting *Rogers & Rogers* at length).

[32] *Id.* at 399.

[33] *Id.* at 400. The *Moyer* court stated that "*[i]n our view the extent of [the architect's] duty may best be defined by reference to the foreseeability of injury consequent upon breach of that duty.*" *Id.* (quoting Audlane Lumber & Builders Supply v. D.E. Britt, 168 So. 2d 333, 335 (Fla. Dist. Ct. App. 1964), *cert. denied*, 173 So. 2d 146 (Fla. 1965)).

Arizona similarly defines liability in terms of foreseeability. In Donnelly Constr. Co. v. Oberg/Hunt/Gilleland, 677 P.2d 1292 (Ariz. 1984), the Arizona Supreme Court ruled that liability exists whenever "both the plaintiff and the risk are foreseeable to a reasonable person [and that] a broad view will be taken of the class of risks and the class of victims that are foreseeable." *Id.* at 1295 (citations omitted) (relying in part on *Rogers & Rogers* and *Moyer*); *see also* Doran-Maine, Inc. v. American Eng'g & Testing, Inc., 608 F. Supp. 609, 615 (D. Me. 1985) (applying Maine law); Waldor Pump & Equip. Co. v. Orr-Schelen-Mayeron & Assoc., 386 N.W.2d 375, 377-78 (Minn. Ct. App. 1986) ("The reasonable skill and judgment expected of professionals [engineers in this case] must be rendered to those who foreseeably rely upon the services.").

One commentator has explained the limiting of negligence liability to foreseeable economic loss as an attempt to keep liability within proportionate limits. *See* Rabin, *supra* note 6, at 1534. Hence, courts have extended liability in "triangular configurations" such

In essence, *Rogers & Rogers* and *Moyer* allow a contractor to rely on the architect's competence.[34] Under the reasoning of these decisions, a contractor may undertake its work and rely on the architect to take reasonable care in preparing the drawings and performing her other tasks. Unsurprisingly, then, courts in some later decisions have protected the contractor's reliance more explicitly, by defining the architect's tort liability in terms of the contractor's reliance. Some courts have made reliance the touchstone for a general negligence claim.[35] Others have

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as the relationships among owners, architects, and contractors, but have not extended liability "to situations of widespread harm." *Id.*

[34] The dissenting judge in *Moyer* would permit a contractor to sue an architect, but only when the contractor relied on the architect and the architect knew of the reliance:

> There may be factual situations which will support a contractor's or engineer's claim against a negligent architect directly affecting such contractor or engineer and under circumstances establishishing [sic] some reliance upon the architect and the architect's knowledge of that reliance; but to extend professional liability generally beyond the one who contracts, pays for and receives and relies upon, that professional skill is a dangerous enlargement and is unsound in my judgment. Such liability cannot be reasonably anticipated by a professional when there is no privity between the parties; neither can he guard against [liability] under this new hind-sight approach in the pursuit of tort liability against him.

Moyer, 285 So. 2d at 403 (Dekle, J., concurring in part and dissenting in part).

[35] For instance, in Forte Bros. v. National Amusements, Inc., 525 A.2d 1301 (R.I. 1987), the court allowed a contractor to sue the architect who had negligently calculated the amount that the owner owed the contractor. The court found the crucial factor to be the contractor's reasonable, foreseeable reliance. *Id.* at 1301-03. Interestingly, one justice concurred based on

> the well-settled general principle that . . . a person who acts as an acknowledged agent . . . is independently liable for his own acts of negligence, despite the fact that these acts are committed in the course and scope of the agency and in furtherance of the disclosed principal's business.

Id. at 1304 (Kelleher, J., concurring) (citing Inter-Ocean (Free-Zone), Inc. v. Manaure Lines, 615 F. Supp. 710, 715 (S.D. Fla. 1985) (finding stevedore liable as bailee of goods, notwithstanding the stevedore's status as agent for the shipper)); *see also* Gateway Erectors Div. v. Lutheran Gen. Hosp., 430 N.E.2d 20, 21 (Ill. App. Ct. 1981) (setting forth the same agency principles). However, the agent cannot be liable in a breach of contract case against the principal, even when the breach was the agent's wrongful conduct. *Forte Bros.*, 525 A.2d at 1304 (Kelleher, J., concurring); *Inter-Ocean*, 615 F. Supp. at 715 (citations omitted).

The agency theory begs the question. The question is when *should* the architect be deemed to commit a tort for which the architect is liable regardless of its status as agent. Holding the agent independently liable in tort merely eliminates the cloak of immunity enjoyed by an agent in contract cases.

For other cases that allow general negligence claims based on the plaintiff's reliance, see McCarthy Well Co. v. St. Peter Creamery, 410 N.W.2d 312, 314-315 (Minn. 1987)

imposed liability for negligent misrepresentation, usually following section 552 of the Restatement (Second) of Torts.[36] Often, courts have

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(stating that Minnesota's economic loss rule only covers cases governed by the UCC); Prichard Bros. v. The Grady Co., 428 N.W.2d 391 (Minn. 1988) (allowing a contractor to sue architect for economic loss); Magnolia Constr. Co. v. Mississippi Gulf S. Eng'rs, Inc., 518 So. 2d 1194, 1202 (Miss. 1988) ("Mississippi law allows third parties to rely on a design professional's contractual obligation to the owner.") (citing Mayor of Columbus, Mississippi v. Clark-Dietz and Assocs.-Eng'rs, Inc., 550 F. Supp. 610, 623-624 (N.D. Miss. 1982)); Northrup Contracting, Inc. v. Village of Bergen, 527 N.Y.S.2d 670, 671-72 (Sup. Ct. 1986) (requiring privity "'or a relationship sufficiently intimate to be equated with privity'" for noncontractual recovery of purely economic loss from another's agent (citation omitted)). The *Northrup* court allowed a contractor to sue the owner's architect for erroneous plans and specifications and for negligent supervision because "knowing and intended reliance upon the agent's work product is sufficient to create the essential bond approaching privity which allows the imposition of noncontractual liability." *Id.*; *see also* Mikropul Corp. v. Desimone & Chaplin-Airtech, Inc., 599 F. Supp. 940, 944 (S.D.N.Y. 1984) (applying the rule in *Northrup* to a suit by a prime contractor against a construction manager based on the prime contractor's foreseeable reliance). Nevada generally prohibits negligence suits for purely economic loss. However, in considering contractors' claims against a city for failure to follow an ordinance requiring payment bond on a project, the court in Charlie Brown Constr. Co. v. City of Boulder, 797 P.2d 946, 953 (Nev. 1990), found this general prohibition to be inapplicable, since "the purely economic recovery rule is bound up in foreseeability" and the contractors' losses were easily foreseeable.

[36] For cases allowing negligent misrepresentation claims generally, see, for example, Gulf Contracting v. Bibb County, 795 F.2d. 980, 982 (11th Cir. 1986) (applying Georgia law) (contractor may sue architect under a Restatement (Second) of Torts § 552 standard); Malta Constr. Co. v. Henningson, Durham & Richardson Inc., 694 F. Supp. 902, 906-07 (N.D. Ga. 1988); United States *ex rel.* Los Angeles Testing Lab. v. Rogers & Rogers, 161 F. Supp. 132, 136 (S.D. Cal. 1958); *Donnelly Constr.*, 677 P.2d at 1296-97; Village of Cross Keys, Inc. v. United States Gypsum Co., 556 A.2d 1126, 1133 (Md. 1989) (allowing a designer to be sued under a Restatement (Second) of Torts § 552 standard for faulty specifications); Page v. Frazier, 445 N.E.2d 148, 154 (Mass. 1983) (emphasizing that the defendant must know that the plaintiff will be relying on the defendant's services); Craig v. Everett M. Brooks Co., 222 N.E.2d 752, 755 (Mass. 1967) (finding an engineer liable to a general contractor for negligently placed stakes, because "the identity of the only possible plaintiff and the extent of his reliance were known to the defendant, and [the] damages [we]re not remote"); National Sur. Corp. v. Malvaney, 72 So. 2d 424, 430-32 (Miss. 1954); *Northrup Contracting*, 527 N.Y.S.2d at 671-72 (finding that a negligent misrepresentation action is available where the prime contractor's reliance is "knowing and intended," even though general third-party negligence claims against architects are prohibited by New York's economic loss rule); Davidson & Jones, Inc. v. New Hanover, 255 S.E.2d 580, 585 (N.C. Ct. App. 1979) (finding an architect liable to a general contractor for errors in the plans and specifications under a Restatement (Second) of Torts § 552 standard); John Martin Co. v. Morse/Diesel, Inc., 819 S.W.2d 428, 431 (Tenn. 1991) (allowing a subcontractor's suit against a construction manager under a negligent misrepresentation theory that rested, in part, on Restatement (Second)

recognized both a general negligence claim and a claim for negligent misrepresentation as alternative avenues for recovery in a given case.[37]

In negligent misrepresentation cases, the prime contractor must show that the damage resulted from its foreseeable reliance on a negligent misrepresentation by the architect and, in states following section 552 of the Restatement (Second) of Torts, that the architect knew of or intended the prime contractor's reliance. In relevant part, Restatement section 552 reads:

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of Torts § 552); *accord* Peter Kiewit Sons' Co. v. Iowa S. Util. Co., 355 F. Supp. 376, 394 (S.D. Iowa 1973) (under Iowa law, supervising engineer has a "duty of care and competence commensurate with the standards of his profession in obtaining and communicating information for the guidance of [a contractor] with respect to its business transactions relating to the" project); Robert & Co. Assoc. v. Rhodes-Haverty Partnership, 300 S.E.2d 503, 504 (Ga. 1983) (finding an engineer liable to a subsequent purchaser under a Restatement (Second) of Torts § 552 standard); Ossining Free Sch. Dist. v. Anderson LaRocca Anderson, 539 N.E.2d 91, 94-95 (N.Y. 1989) (allowing an owner's negligent misrepresentation suit against the consulting engineer hired by the owner's architect because the owner's known, intended reliance created a relationship between the owner and the consultant which was "so close as to be the functional equivalent of contractual privity," as required by New York law). *But see* Floor Craft Floor Covering, Inc. v. Parma Community Gen. Hosp. Assoc., 560 N.E.2d 206, 213 (Ohio 1990) (rejecting a claim that a negligent misrepresentation action should lie where a general negligence claim could not).

[37] *See supra* note 36. New York has attempted to put a tight reign on such negligent misrepresentation cases. In Ossining Free Sch. Dist. v. Anderson LaRocca Anderson, 539 N.E.2d 91 (N.Y. 1989), the owner sued a consulting engineer hired by the owner's architect for negligent misrepresentation. The court posed the question as whether "negligent misrepresentation cases, which produce only economic injury . . . require[ ] that the underlying relationship between the parties be one of contract or the bond between them so close as to be the functional equivalent of contractual privity." *Id* at 91. The New York approach differs from other states with regard to the rationale underlying the rule: setting manageable bounds on liability. *Id.* at 93 (citing Rabin, *supra* note 6, and relying heavily on Glanzer v. Shepard, 233 N.Y. 236 (1922)). In finding that the owner's intended reliance created the sufficient bond, the court applied the following three criteria:

> (1) awareness that the reports were to be used for a particular purpose or purposes;
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> (2) reliance by a known party or parties in furtherance of that purpose; and
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> (3) some conduct by the defendants linking them to the party or parties and evincing defendant's understanding of their reliance.

Id. at 95 (citation omitted). Lower New York courts and federal courts applying New York law have found the inquiry essentially the same for other construction-related negligence claims for economic loss, but have been badly split as to the results reached. *E.g.*, Board Managers of the Astor Terrace Condominium v. Lichtenstein, 583 N.Y.S.2d 398 (App. Div. 1992) (finding negligence and attaching liability to the engineering and design professionals); Lake Placid Club Attached Lodges v. Elizabethtown Lodges, 521 N.Y.S.2d 165 (App. Div. 1987) (finding no liability on behalf of the builder or architects because there was no relationship approaching privity).

> Information Negligently Supplied for the Guidance of Others
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> (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
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> (2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered
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> (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
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> (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.[38]

Properly understood, the negligent misrepresentation cases are simply a subset of the general negligence claims recognized in *Rogers & Rogers* and *Moyer*. This subset simply excludes those cases in which the architect's *failure to act* injured the contractor, such as when an architect fails to approve timely a contractor's work and thereby prevents the contractor from proceeding further.[39]

When the architect misperforms a task, the issues are essentially the same, whatever the rubric. For instance, it is difficult to see a difference between the inquiry under section 552 and ordinary causation analysis. If *Rogers & Rogers* had not relied on the architect's approval of the bents, the architect's negligence would not have been the cause of the injury. Even the feature which seems most to distinguish a negligent misrepresentation claim from a general negligence action–the requirement of Restatement section 552 that the architect knew of or intended the contractor's reliance–adds little. Architects know that contractors rely on a project's plans and specifications. Facts indicating that an architect neither knew of nor intended the prime contractor's reliance should also negate a negligence claim. For example, if the architect said to the

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[38] RESTATEMENT (SECOND) OF TORTS § 552 (1977).

[39] *See, e.g., Malta Constr. Co.*, 694 F. Supp. at 906-07. In *Malta*, the contractor's claim against the architect for failure to review shop drawings promptly and adequately was based on a failure to act, not on a misrepresentation, and was therefore not actionable under a negligent misrepresentation theory. Consequently, the contractor's claim was barred by Georgia's economic loss rule. *Id.*

contractor in *Rogers & Rogers* that "the bents look good to me, but I'm just guessing so you better check it out for yourself," the architect's actions could hardly be said to have foreseeably to have caused the injury. In other words, circumstances where the architect could not be required to anticipate the prime contractor's reliance would also negate the existence of a duty to use reasonable care to avoid foreseeable injury to the contractor.

B. Not All Negligence Cases Are the Same

Rogers & Rogers and *Moyer* allowed a contractor's tort recovery of pecuniary loss from a negligent architect because other cases had allowed a plaintiff who was not a party to the contract to sue based on the negligent performance of a contractual duty. Even assuming, however, that those predicate cases were correctly decided, they do not compel the results reached in *Rogers & Rogers* and *Moyer*.

The *Rogers & Rogers* court relied, *without comment*, on two California negligence cases. One case, *Biakanja v. Irving*,[40] held that a notary who negligently drafted a will was liable in tort to the disappointed beneficiary.[41] *Biakanja*, however, can be seen as a relatively simple problem of standing to enforce contract rights.[42] Had the testator discovered the error before she died, she undoubtedly could have sued the notary for breach of contract. The question, then, is whether someone should be allowed to sue the notary in the testator's stead. The answer to this question turns on whether the otherwise remediless *Biakanja* plaintiff

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[40] 320 P.2d 16 (Cal. 1958).

[41] The *Biakanja* court stated that determining whether tort liability should exist absent privity requires balancing the following factors:

> the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm.

Id. at 19. The *Rogers & Rogers* court found this formulation to be satisfied. United States *ex rel.* Los Angeles Testing Laboratory v. Rogers & Rogers, 161 F. Supp. 132, 136 (S.D. Cal. 1958); *see also* Note, *Liability of Architects and Engineers to Third Parties: A New Approach*, 53 NOTRE DAME L. REV. 306, 319 (1977) (stating that tort liability should turn on essentially the factors listed above).

[42] *See* Victor P. Goldberg, *Accountable Accountants: Is Third-Party Liability Necessary?*, 17 J. LEGAL STUD. 295, 308-09 (1988) (suggesting that *Biakanja* and other disappointed beneficiary cases could be treated under contract law, thereby eliminating "confusing and misleading precedents" without altering the outcome).

should be deemed a third-party beneficiary to the testator-notary contract.[43] Rogers & Rogers, by contrast, had contract rights against the owner who, in turn, had contract rights against the architect.[44]

The other California negligence case on which the *Rogers & Rogers* court relied is *Dow v. Holly Mfg. Co.*[45] In *Dow*, three members of the second family to live in a house died of asphyxiation when a heater installed by the contractor malfunctioned. Finding the analogy to products liability compelling, the court allowed the family to recover from the contractor. The court stated that "building contractors will be treated like all other independent contractors, manufacturers, and vendors in regard to negligently manufactured products which cause injuries to persons not in privity of contract."[46]

But *Dow*, too, is distinguishable from *Rogers & Rogers*. There is a far greater need for creating extracontractual solutions in personal injury cases, such as *Dow*, than in construction disputes, such as *Rogers & Rogers*. One cannot assume that the residents in *Dow* had satisfactory contract remedies against the contractor.[47] More importantly, one cannot assume generally that persons, including homeowners, can adequately address potential personal injuries by contract. On the other hand, Rogers & Rogers had a contract that specifically included provisions defining its relationship with the architect[48] and that, at least as a matter of law, allocated liability for potential economic losses.[49] One can assume that the parties to a construction project are capable of addressing by contract the effects of architectural mistakes. Thus, personal injury victims face barriers to contract solutions that contractors confronting the potential results of an architect's actions do not face.[50]

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[43] *See id.* (suggesting that a disappointed beneficiary should be allowed to sue in contract); *see also* Bishop & Sutton, *supra* note 6, at 359 (favoring third-party recovery).

[44] *See infra* part II.E.

[45] 321 P.2d 736 (Cal. 1958).

[46] *Id.* at 740 (quoting *Recent Decisions*, 42 VA. L. REV. 391, 403-05 (1956)).

[47] It is not at all clear that the *Dow* plaintiffs had sufficient warranty remedies that were not barred by the statute of limitations. Moreover, most personal injury victims will have even less contractual connection with the person causing the injury than was present in *Dow*.

[48] United States *ex rel.* Los Angeles Testing Laboratory v. Rogers & Rogers, 161 F. Supp. 132, 134-35 (S.D. Cal. 1958).

[49] *See infra* part II.E.

[50] The Supreme Court has explicitly recognized this point. *See* East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 871-72 (1986) (discussed *infra* notes 66-77 and accompanying text); *see also* U.C.C. § 2-719(3) (1993) (contract limitations for personal injury recovery are unenforceable for consumer goods).

Without tort liability, many personal injury victims would go uncompensated, and those causing the injury would go underdeterred.[51]

The *Moyer* court likewise relied on personal injury cases.[52] The court reasoned that the policy behind holding those who produce defective products liable for personal injuries dictates that negligent architects also be liable for a contractor's increased expenses.[53] As the *Moyer* court stated:

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[51] Of course, this skirts the question of how much compensation for personal injuries is appropriate. *Cf.* John E. Calfee & Paul H. Rubin, *Some Implications of Damage Payments for Nonpecuniary Loss*, 21 J. LEGAL STUD. 371, 402-03 (1992) (examining the effects of compensation for nonpecuniary loss).

[52] The cases cited by the *Moyer* court include Erhart v. Hummonds, 334 S.W.2d 869 (Ark. 1960) (wrongful death), Montijo v. Swift, 219 Cal. App. 2d 351 (1963) (personal injury), Conklin v. Cohen, 287 So. 2d 56 (Fla. 1973) (wrongful death), Mai Kai, Inc. v. Colucci, 205 So. 2d 291 (Fla. 1967) (personal injury), Matthews v. Lawnlite Co., 88 So. 2d 299 (Fla. 1956) (products liability suit for personal injuries), and Geer v. Bennett, 237 So. 2d 311 (Fla. Dist. Ct. App. 1970) (personal injury). The *Moyer* court also relied on Willner v. Woodward, 109 S.E.2d 132 (Va. 1959), an ordinary breach of contract case holding that an architect owed the owner a contractual duty to use reasonable care in supervising construction, and Alexander v. Hammarberg, 230 P.2d 399 (Cal. Ct. App. 1951), a suit by homeowners against their architect for negligent supervision. Apparently concerned with *stare decisis*, the court distinguished a title abstractor's case and an accountant's case, both finding no tort duty to third parties, on the basis that an architect's relationship with a contractor is different. A.R. Moyer, Inc. v. Graham, 285 So. 2d 397, 399-400 (Fla. 1973). How the relationship differs is not explained.

[53] Many other cases have likewise imposed liability by drawing an analogy to products liability. *See, e.g.*, Donnelly Constr. Co. v. Oberg/Hunt/Gilleland, 677 P.2d 1292 (Ariz. 1984). Other cases have imposed liability or recognized a cause of action with little or no comment, apparently assuming that negligence or products liability theories apply. *See, e.g.*, Ramey Constr. Co. v. Apache Tribe of the Mescalero Reservation, 673 F.2d 315, 321-22 (10th Cir. 1982) (by implication); C.H. Leavell & Co. v. Glantz Contracting Corp. of La., 322 F. Supp. 779, 784 (E.D. La. 1971) (applying Louisiana law, the court recognized a negligence action by a contractor against the owner's architect without discussion); Kellogg v. Pizza Oven, Inc., 402 P.2d 633, 636 (Colo. 1965) (without discussion); Insurance Co. of N. Am. v. GMR, Ltd., 499 A.2d 878, 883 (D.C. 1985) (by implication); Ballenger Corp. v. Dresco Mechanical Contractors, 274 S.E.2d 786, 792 (Ga. Ct. App. 1980) (by implication); Gurtler, Herbert and Co. v. Weyland Mach. Shop, 405 So. 2d 660 (La. Ct. App. 1981), *writ denied*, 410 So. 2d 1130 (La. 1982) (recognizing a negligence action without discussion); Magnolia Constr. Co. v. Mississippi Gulf S. Eng'rs, Inc., 518 So. 2d 1194, 1202 (Miss. 1988) (finding that duty, and therefore liability, can arise from the conduct of supervising engineer); Engle Acoustic & Tile, Inc. v. Grenfell, 223 So. 2d 613, 620 (Miss. 1969) (by implication); State *ex rel.* Nat'l Sur. Corp. v. Malvaney, 72 So. 2d 424, 430-32 (Miss. 1954) (finding an architect liable to surety for negligently approving release of retainage); Vonasek v. Hirsch and Stevens, Inc., 221 N.W.2d 815, 823 (Wis. 1974) (allowing contractor to sue owner's architect for negligent preparation of plans and specifications and negligent supervision of construction which caused a joist to collapse, although no negligence was found on the facts).

> Privity is a theoretical device of the common law that recognizes limitation of liability commensurate with compensation for contractual acceptance of risk. The sharpness of its contours blurs when brought into contact with modern concepts of tort liability. MacPherson v. Buick Motor Co. . . . is heralded not so much for its decision on the facts as for its precedential value: a case relaxing privity's strictures. In Matthews v. Lawnlite Co. . . . th[is] Court recognized *MacPherson* as humane and accepted its principle.[54]

With respect to the privity requirement, one state that has statutorily eliminated the privity barrier is Mississippi. MISS. CODE ANN. § 11-7-20 (Supp. 1993) ("In all causes of action for personal injury or property damage or economic loss brought on account of negligence, strict liability or breach of warranty, including actions brought under the provisions of the Uniform Commercial Code, privity shall not be a requirement to maintain said action."). Predictably, this statute has quieted any further debate over the availability of a contractor's tort claim against an architect. *See* Owen v. Dodd, 431 F. Supp. 1239, 1242 (N.D. Miss. 1977) (applying Mississippi law); DeVille Furniture Co. v. Jesco, Inc., 423 So. 2d. 1337, 1342 (Miss. 1983).

A Georgia statute also speaks to the issue. GA. CODE ANN. § 51-1-11(a) (Michie 1982) reads:

> Except as otherwise provided in this Code section, no privity is necessary to support a tort action; but, if the tort results from the violation of a duty which is itself the consequence of a contract, the right of action is confined to the parties and those in privity to that contract, except in cases where the party would have a right of action for the injury done independently of the contract . . . .

In R.H. Macy & Co. v. Williams Tile & Terrazzo, 585 F. Supp. 175, 180 (N.D. Ga. 1984), a federal district court, applying Georgia law, considered this statute in denying a subcontractor's suit against an architect based on faulty specifications. The court viewed the issue as whether the architect owed a duty of care essentially by virtue of the architect's status as a professional and concluded that there must be some "type of professional relationship" between the subcontractor and the architect, or that their relationship must "'approach[ ] that of privity.'" *Id.* at 178-80 (citation omitted).

[54] 285 So. 2d at 399 (citations omitted). The role of products liability law and the importance of foreseeability as the only limit on liability are evident in the principal Florida case on which the *Moyer* court relied, Audlane Lumber & Builders Supply v. D.E. Britt Assocs., 168 So. 2d 333 (Fla. Dist. Ct. App. 1964), and which the court described as "a natural extension of the *Matthews* case." *Moyer*, 285 So. 2d at 399. In *Audlane*, Britt, an architect, designed roof truss plans and specifications and sold them to Anchor Lock, which was apparently a builder's supply vendor. Anchor Lock fabricated metal truss plates and sold them, together with the plans and specifications, to Audlane. Audlane then constructed the trusses using Anchor's plates and according to Britt's design. A contractor purchased completed trusses from Audlane and incorporated them into a house. After the trusses failed and Audlane paid for repairs, Audlane sued Britt in tort. Based on MacPherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916), the court found the injury to be foreseeable and allowed recovery. *Audlane Lumber*, 168 So. 2d at 335. The court, however, rejected Audlane's implied warranty claim. Since a professional only warrants

C. *An Exception to the Economic Loss Rule?*

In *Robins Dry Dock & Repair Co. v. Flint*,[55] the owner put a ship in dry dock for scheduled repairs. During replacement of the ship's damaged propeller, a dry dock employee allowed the replacement propeller to fall, breaking a blade. The ship was out of service during the two weeks that it took to have a new propeller cast and installed. The ship was under charter at the time, and the charterer brought a contract claim against the owner seeking to recover for loss of use of the ship.[56] The court rejected the claim, finding that the owner did not breach the charter.[57]

The charterer then sued the dry dock for the difference between the rate of hire in its charter (which was suspended during the repair period under the charter's cesser of hire clause) and the rate of hire in an existing subcharter.[58] Upon reaching the Supreme Court, Justice Holmes rejected the charterer's claim as a third-party beneficiary to the contract between the owner and the dry dock and concluded that the charterer had no property interest in the ship on which to base the suit.[59] Justice Holmes then rejected the charterer's negligence claim, citing a general rule that "a tort to the person or property of one man does not make the tortfeasor liable to another merely because the injured person was under a contract with the other, unknown to the doer of the wrong."[60]

The holding in *Robins* has evolved into a modern, general prohibition against tort recovery for economic loss.[61] In its broadest formulation, the

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"that he will or has exercised his skill according to a certain standard of care, [and] that he acted reasonably and without neglect," the warranty claim merges into the negligence claim. *Id.* Hence, "use of the term 'implied warranty' in these circumstances [would] merely introduc[e] further confusion into an area of law where confusion abounds." *Id.*

[55] 275 U.S. 303 (1927) [hereinafter *Robins*].

[56] *Id.* at 307.

[57] The charterer's contract claim is reported in The Bjornefjord, 271 F. 683, 684 (2d Cir. 1921).

[58] *Robins*, 275 U.S. at 307. Due to the outbreak of World War I, the charterer, who paid £ 1,200 per month for the use of the ship, was able to subcharter the ship for £ 11,200 per month. *See* Victor P. Goldberg, *Recovery for Pure Economic Loss in Tort: Another Look at* Robins Dry Dock v. Flint, 20 J. LEGAL STUD. 249, 253 (1991).

[59] *Robins*, 275 U.S. at 307-09.

[60] *Id.* at 309.

[61] A recent article has examined *Robins* in detail and concluded that resolving the issues presented in that case does little toward resolving whether mere economic loss should be compensable in other contexts. *See* Goldberg, *supra* note 58, at 275. Moreover, as a matter of doctrine *Robins* could have remained confined to situations in which the third party's interest was unknown or not foreseeable.

economic loss rule prohibits tort recovery in negligence or products liability "absent physical injury to a proprietary interest."[62] Under this sweeping rule, recovery of economic loss is foreclosed when a product[63] or service[64] falls short of an expected level of quality yet causes no personal injury or property damage.[65]

A recent admiralty products liability decision by the Supreme Court exhaustively articulated the purposes underlying the economic loss rule. In *East River Steamship Corp. v. Transamerica Delaval, Inc.*,[66] Shipbuilding, a subsidiary of Seatrain, contracted for Transamerica Delaval to design, manufacture, and install turbines in four supertankers that Shipbuilding was under contract to build for four other subsidiaries of Seatrain.[67] After construction, title to the tankers was transferred to a company as trustee for the owner. The owner then leased the four tankers under bareboat charters to four other subsidiaries of Seatrain.[68] Bareboat charters oblige the charterer to bear the costs of any repairs.[69] Three of the turbines were defective, while the other had been installed improperly.[70] Seatrain and its subsidiaries that were involved in the construction of the ships sued Transamerica Delaval for breach of contract and breach of warranty, but these claims were dismissed as barred by the statute of limitations.[71]

The charterers sued Transamerica Delaval in negligence and products liability to recover the cost of repairing the turbines and for income lost

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[62] State of La. *ex rel.* Guste v. M.V. Testbank, 752 F.2d 1019, 1023 (5th Cir. 1985) (en banc), *cert. denied*, 477 U.S. 903 (1986). This case involved a catastrophic collision on the Mississippi River. The Fifth Circuit heard the case en banc in order to reconsider the modern reach of *Robins*. *Id.* at 1021.

[63] *See, e.g.*, East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 875 (1986) [hereinafter *East River*].

[64] *See Robins*, 275 U.S. at 308; Flintkote Co. v. Dravo Corp., 678 F.2d 942 (11th Cir. 1982) (finding that Georgia's economic loss rule applies to professional services).

[65] The minority view, which is that mere economic loss generally can be recovered in a negligence action, is well illustrated by the California Supreme Court's decision in J'Aire Corp. v. Gregory, 598 P.2d 60 (Cal. 1979). In *J'Aire*, the owner of a building leased space to a tenant who operated a restaurant. The owner hired a contractor to renovate part of the building that lay entirely within the restaurant's leased space. *Id.* at 62. The court allowed the tenant to sue the contractor for purely economic loss when the contractor's negligence allegedly caused the restaurant to lose business. *Id.* at 62-63.

[66] 476 U.S. 858 (1986).

[67] *Id.* at 859.

[68] *Id.* at 859-60.

[69] *Id.* at 860.

[70] *Id.* at 860-61.

[71] *Id.* at 861.

during the period that turbine problems rendered the ships idle.[72] In refusing to recognize these claims, the Court concluded that contract law provided a more suitable framework for analysis:[73]

> We realize that the damage [to the defective product] may be qualitative, occurring through gradual deterioration or internal breakage. Or it may be calamitous. But either way, since by definition no person or other property is damaged, the resulting loss is purely economic. Even when the harm to the product itself occurs through an abrupt, accident-like event, the resulting loss . . . is essentially the failure of the purchaser to receive the benefit of its bargain–traditionally the core concern of contract law.[74]
>
> . . . .
>
> "The distinction that the law has drawn between tort recovery for physical injuries and warranty recovery for economic loss is not arbitrary and does not rest on the 'luck' of one plaintiff in having an accident causing physical injury. The distinction rests, rather, on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products." When a product injures only itself the reasons for imposing a tort duty [safety of persons and property] are weak and those for leaving the party to its contractual remedies are strong.[75]
>
> . . . .
>
> Contract law, and the law of warranty in particular, is well suited to commercial controversies of the sort involved in this case because the parties may set the terms of their own agreements. The manufacturer can restrict its liability . . . . In exchange, the purchaser pays less for the product. Since a commercial situation generally does not involve large disparities in bargaining power, we see no reason to intrude into the parties' allocation of the risk.[76]

Whatever the outer reaches of the economic loss rule, under *Robins* and *East River* the core prohibition speaks to situations in which the loss is confined to a small group who have addressed or can address the matter through contractual arrangements. Yet, many states which enforce

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[72] *Id.*

[73] For a discussion of minority views, see *id.* at 868-70.

[74] *Id.* at 870 (citations omitted).

[75] *Id.* at 871 (citation omitted) (quoting Seely v. White Motor Co., 403 P.2d 145, 151 (Cal. 1965)).

[76] *Id.* at 872-73 (citations omitted).

a general prohibition against recovery of purely economic loss in negligence or products liability nevertheless allow contractors to sue architects for purely economic loss–a case seemingly within the core of the prohibition.[77]

Florida, the *Moyer* jurisdiction, provides the defining example. The Florida Supreme Court has squarely held that a buyer of services cannot sue its seller in tort for purely economic loss[78] and that a buyer cannot sue its seller or a remote seller in tort for economic loss caused by defective goods.[79] Nevertheless, the court expressly exempted its earlier decision in *Moyer* from these prohibitions, reasoning that "the supervisory responsibilities vested in the architect carried with it a concurrent duty not to injure foreseeable parties not beneficiaries of the contract. . . . Since there was no contract under which the general contractor could recover his loss, we concluded he did have a cause of action in tort."[80]

D. *The Alternative Approach in Cases Rejecting* Rogers & Rogers *and* Moyer

Nearly all of the cases that reject *Rogers & Rogers* and *Moyer* do so because they find that contract law provides a more suitable framework for analyzing claims such as those presented in *Rogers & Rogers* and *Moyer*.[81] In specific doctrinal terms, courts have disallowed tort relief

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[77] *Compare* Guardian Constr. Co. v. Tetra Tech Richardson, Inc., 583 A.2d 1378, 1385-86 (Del. Super. Ct. 1990) (allowing a Restatement (Second) of Torts § 552 action, even if Delaware law would otherwise bar a negligence suit for purely economic loss) *with* Pierce Assocs. v. Nemours Found., 865 F.2d 530, 540-41 (3d Cir. 1988) (reaching the contrary result under Delaware law), *cert. denied*, 492 U.S. 907 (1989). *See* McCarthy Well Co. v. St. Peter Creamery, 410 N.W.2d 312, 314-15 (Minn. 1987) (Minnesota's economic loss rule only covers cases governed by the UCC); Prichard Bros. v. The Grady Co., 428 N.W.2d 391, 392 (Minn. 1988) (allowing a contractor to sue an architect for economic loss); *accord* Northrup Contracting v. Village of Bergen, 527 N.Y.S.2d 670, 671-72 (Sup. Ct. 1986) (stating that a negligence recovery for purely economic loss is allowed under section 552, even if New York otherwise bars such recovery); John Martin Co., Inc. v. Morse/Diesel, Inc., 819 S.W.2d 428 (Tenn. 1991) (stating that although Tennessee follows *Robins* generally, it had no application in a subcontractor's suit against a construction manager for negligent misrepresentation).

[78] AFM Corp. v. Southern Bell Tel. & Tel. Co., 515 So. 2d 180, 180 (Fla. 1987).

[79] Florida Power & Light Co. v. Westinghouse Elec. Corp., 510 So. 2d 899 (Fla. 1987).

[80] *AFM Corp.*, 515 So. 2d at 181. The court meant that there was no contract under which the contractor could sue the architect. The court failed to discuss whether the contractor could recover its loss by a contract claim against someone else, such as the owner. *See infra* part II.E.

[81] For instance, the dissent in *Moyer* took a similar approach:

because a contractor's claim against an architect for increased construction costs falls within the jurisdiction's general prohibition against negligence recovery for purely economic loss.[82]

> "[M]odern concepts" [of tort liability] are attained at the expense of applicable standards; the desired result is attained by the juggling of differing authorities in products liability and unrelated tort cases.
>
> It is not difficult to rewrite the law if one sets out on a determined course to depart from established precedent; what is difficult is to stand firm in support of the sound principles of fundamental law, against the onslaught of new and novel theories asserted to provide economic relief to the present unfortunate litigant, from some source which appears available to tap.
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> The liability of the architect should follow logical and mutually agreed or reasonably implied lines of responsibility between contractor and architect, within which framework an architect's failures can then be asserted in a proper claim. Moreover, such claims can, of course, be pursued by the owner against the architect where the contractor has successfully asserted the claim or defense against the owner. . . . Neglect to agree in advance on responsibilities or to take available precautions should not be the basis for corrupting established and well founded principles of liability.

A.R. Moyer, Inc. v. Graham, 285 So. 2d 397, 404 (Fla. 1973) (Dekle, J., concurring in part and dissenting in part).

[82] For example, in Jardel Enter. v. Triconsultants, Inc., 770 P.2d 1301, 1303-05 (Colo. Ct. App. 1988), an owner was not allowed to sue a subcontractor in tort because the prime contract contained a liquidated damages provision, and the court viewed the owner as an intended, creditor beneficiary of the subcontract. *Id.* at 1303. The court viewed the rejection of the tort claim as one application of a general rule prohibiting contract parties or beneficiaries from suing in tort for purely economic loss caused by the breach of a contract duty. "A claim for economic loss on a contract should not be translatable into a tort action in order to escape some roadblock to recovery on a contract theory." *Id.* at 1304. Oddly, the court would seemingly take a different stance if the claim could be shaped as one for negligent misrepresentation. *Id.* at 1305. Moreover, the Indiana Supreme Court in Citizens Gas & Coke Util. v. American Economy Ins. Co., 486 N.E.2d 998 (Ind. 1985), rejected a subsequent purchaser's claim against a contractor for property damage. The court found that privity was a bar in products liability and contractor liability suits except for cases "involving personal injury caused by a product or work in a condition that was dangerously defective, inherently dangerous or imminently dangerous such that it created a risk of imminent personal injury" . . . based "on humanitarian principles" behind compensating personal injury victims. *Id.* at 1000.

See also, e.g., Malta Constr. Co. v. Henningson, Durham & Richardson Inc., 694 F. Supp. 902, 906-07 (N.D. Ga. 1988) (holding that a contractor may sue an architect for negligent misrepresentation under a narrow exception to the economic loss rule which applied only to the negligent supply of false information); Tusch Enter. v. Coffin, 740 P.2d 1022, 1026 (Idaho 1987) (finding a suit by a remote purchaser against the builder was barred by the general Idaho rule that purely economic losses are not recoverable in tort); State v. Mitchell Constr. Co., 699 P.2d 1349, 1350 (Idaho 1984) (applying the rule that purely economic losses are not recoverable in tort in an owner's suit against its prime contractor); Nebraska Innkeepers v. Pittsburgh-Des Moines Corp., 345 N.W.2d 124, 128

Two Illinois opinions exemplify this approach. In *Bates & Rogers Construction Corp. v. North Shore Sanitary District*,[83] the court found that the contractors' negligence action against the architect, which was based on allegations of defective plans and negligent supervision, was barred by the general Illinois rule against tort recovery for purely economic loss. The court found that the contractors complained only of defeated contract expectations, for which they had adequate contract and warranty remedies.[84] As the court explained:

> [T]he damage suffered by the plaintiffs was to their "expectation interest" that they would be able to successfully complete their performance of the contract, and that the [owner, through its agent, the architect/engineer] would not hinder them in the performance of their contract, thereby allowing them to receive the full benefit of their bargain with the [owner]. In our view, this is clearly an interest which

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(Iowa 1984) (interpreting a prior case to allow a contractor to sue the owner's architect only if the economic loss was "an integral part" of accompanying personal injury or property damage); Morse/Diesel, Inc. v. Trinity Indus., 859 F.2d 242, 248-49 (2d Cir. 1988) (dismissing a subcontractor's negligence claims against other subcontractors was proper because of the lack of privity or some other relationship "so close as to be the functional equivalent of contractual privity," which is required by New York law to escape the general prohibition against tort recovery for purely economic loss); Widett v. United States Fidelity and Guar. Co., 815 F.2d 885, 886-87 (2d Cir. 1987) (holding that absent privity, an architect was not liable in tort to subcontractors who detrimentally relied on erroneous site plans because professionals are generally not liable in negligence absent privity); R.H. Macy & Co. v. Williams Tile & Terrazzo, 585 F. Supp. 175, 180 (N.D. Ga. 1984) (applying Georgia law, an architect owes no tort duty to a subcontractor if there is "no indication that any type of professional relationship existed between [the architect and the subcontractor] *or* that their relationship 'approaches that of privity'" (citation omitted)); Council of Co-Owners v. Whiting-Turner Contracting Co., 517 A.2d 336 (Md. 1986) (Maryland's highest court held that architects and contractors are liable without regard to privity "to those persons foreseeably subjected to the risk of personal injury because of a latent and unreasonably dangerous condition resulting from that negligence." 517 A.2d at 338. Whether property damage would suffice was left an open question. *Id.* at 344.); Key Int'l Mfg. v. Morse/Diesel, Inc., 536 N.Y.S.2d 792, 793-95 (App. Div. 1988) (holding that, absent privity, an owner cannot sue an architect or prime contractor in negligence for purely economic loss given New York's general prohibition against tort recovery in such cases); Carmania Corp., N.V. v. Hambrecht Terrell Int'l, 705 F. Supp. 936, 938-40 (S.D.N.Y. 1989) (following *Key Int'l* in forbidding a tort suit by an owner against its architect, since the damages sought "are of the type remediable in contract" (citations omitted)); Dershaw County Bd. of Educ. v. United States Gypsum Co., 396 S.E.2d 369 (S.C. 1990) (discussing the uncertain reach of the economic loss rule in South Carolina in construction cases).

[83] 471 N.E.2d 915 (Ill. Ct. App. 1984), *aff'd*, 486 N.E.2d 902 (Ill. 1985).

[84] 471 N.E.2d at 922.

> is meant to be protected by the law of contract since each party to a construction contract impliedly warrants not to do anything to hinder the performance of the other party.[85]

A subsequent Illinois Supreme Court opinion elaborated further:

> Because the question involved in [these cases] is one of dividing risks and responsibilities among the participants in a commercial transaction according to their intentions, rather than one of protecting persons and property (including profits) from injury with rules that promote safety and reasonable conduct, . . . contract law [provides] the scale on which to weigh the merits of [a contractor's] complaint.[86]

The Virginia Supreme Court's parallel analysis is also instructive. In *Blake Construction Co., Inc. v. Alley*,[87] the court concluded:

> A duty to use ordinary care and skill is not imposed in the abstract. It results from a conclusion that an interest entitled to protection will be damaged if such care is not exercised. Traditionally, interests which have been deemed entitled to protection in negligence have been related to *safety* or freedom from physical harm. . . . [W]here mere deterioration or loss of bargain is claimed, the concern is with a failure to meet

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[85] *Id.* at 924 (citation omitted); *see also* Fence Rail Dev. Corp. v. Nelson & Assoc., 528 N.E.2d 344, 348 (Ill. Ct. App.) (holding that builder was not entitled to award of damages based on economic loss), *appeal denied*, 535 N.E.2d 401 (Ill. 1988); Olfenburg v. Hagemann, 512 N.E.2d 718, 723 (Ill. Ct. App. 1987), *appeal denied*, 520 N.E. 2d 387 (Ill. 1988) (finding that damages sought in third-party complaint for economic loss were not recoverable in tort).

[86] Anderson Elec., Inc. v. Ledbetter Erection Corp., 503 N.E.2d 246, 251 (Ill. 1987) (Simon, J., specially concurring). *Anderson Electric* involved an electrical subcontractor's suit against the manufacturer of electrical devices who had agreed to supervise and inspect the subcontractor's installation of its devices. *Id.* at 247. The court seemed to say that adequate contract remedies existed, even if contract recovery is foreclosed in a given case. A plaintiff seeking to recover purely economic losses due to defeated expectations of a commercial bargain cannot recover in tort, regardless of the plaintiff's inability to recover under an action in contract. *Id.* at 249. Nevertheless, it is unclear from the opinion whether the rule would apply if the plaintiff truly had no remedy, as opposed to being barred from pursuing a remedy that it had once had. Moreover, recovery is still available under Illinois law where one "in the business of supplying information for the guidance of others in their business transactions makes negligent misrepresentations." *Id.* (citing Moorman Mfg. Co. v. National Tank Co., 435 N.E.2d 443, 452 (Ill. 1982)).

[87] 353 S.E.2d 724 (Va. 1987).

> some standard of *quality*. This standard of quality must be defined by reference to that which the parties have agreed upon.[88]
>
> . . . .
>
> Protection against economic losses caused by another's failure properly to perform is but one provision the contractor may require in striking his bargain.[89]

E. A Contractor's Contract Remedies

Unlike in most personal injury cases and many negligence cases generally, in the context of an architect's negligence, tort law does not provide the only plausible remedial scheme.[90] Written contracts, often of an extraordinarily complex nature, exist between the owner and the contractor, and the owner and the architect. The most obvious remedial alternative, then, is for the parties expressly to provide the contractor with redress for damages caused by architectural error. For instance, the contract between the owner and the contractor could explicitly allow the contractor to sue the owner for problems caused by the architect, or the contract between the owner and the architect could allow the contractor to sue for the breach of any obligations contained therein. Another alternative would be for the contract between the owner and the contractor to assign some or all of the owner's rights against the architect to the contractor.[91]

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[88] *Id.* at 726 (quoting Crowder v. Vandendeale, 564 S.W.2d 879, 882 (Mo. 1978)).

[89] *Id.* at 727 (citations omitted); *see also* Floor Craft Floor Covering, Inc. v. Parma Community Gen. Hosp. Ass'n, 560 N.E.2d 206 (Ohio 1990) (following the rationale of *Blake Construction*). The *Floor Craft* court emphasized that the architect's obligations were merely one feature of the various contractual undertakings on a construction project. *Id.* at 209. In this context, the overriding need is to consider whether the liability at issue was within the contemplation of the contracting parties. This need is poorly served by tort law, because

> [t]he controlling policy consideration underlying tort law is the safety of persons and property–the protection of persons and property from losses resulting from injury. The controlling policy consideration underlying the law of contracts is the protection of expectations bargained for.

Id. at 211 (quoting Sensenbrenner v. Rust, Orling & Neale, 374 S.E.2d 55, 58 (Va. 1988)).

[90] *See, e.g.*, William Bishop, *The Contract-Tort Boundary and the Economics of Insurance*, 14 J. LEGAL STUD. 242, 243 (1983) (stating that articulating agreements that the parties would create themselves, if the terms were not too costly to negotiate, is a principal feature of contract and tort law).

[91] Contracts produced by the American Institute of Architects expressly make the architect a third party beneficiary to the provisions of the agreement between the owner

Even if the parties fail to so provide, though, the law already provides the contractor with contract remedies. First, the owner gives an implied warranty that the plans and specifications are adequate.[92] Consequently, the prime contractor can sue the owner for breach of this warranty and recover expenses incurred as a result of erroneous architectural drawings.[93] Likewise, where contractor recovery is appropriate,[94] a contractor has adequate contract remedies against the owner for damages caused by an architect's misperformance of supervisory tasks.[95] It is black letter law that an owner is liable when an architect, acting as its agent with regard to supervisory tasks, breaches some obligation in the owner's agreement with the contractor.[96] Two of the more significant contractual

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and the contractor in the architect's favor, while simultaneously disclaiming any contractual relationship between the architect and the contractor. AMERICAN INST. OF ARCHITECTS, *General Conditions of the Contract for Construction* (Doc. No. A201), Article 1.1.2 (13th ed. 1976), *reprinted in* 2 AMERICAN INST. OF ARCHITECTS, HANDBOOK OF PROFESSIONAL PRACTICE (1977) [hereinafter *AIA General Conditions*]. The *AIA General Conditions* contain most of the important allocations of architectural error, and have been described as

> the most widely used construction contract document in the world today. In 1989 alone, more than one million copies were sold. Countless others were used or adapted for other purposes or contracts. Virtually every construction contract drawn in the United States today either borrows language or concepts from the AIA General Conditions.

Gregory W. Hummel, *Construction Law Symposium Preface*, 24 REAL PROP., PROB. & TR. L.J. 521 (1990).

[92] *See* United States v. Spearin, 248 U.S. 132, 137 (1918); *see also* S. Derstein, Annotation, *Construction Contractor's Liability to Contractor for Defects or Insufficiency of Work Attributable to the Latter's Plans and Specifications*, 6 A.L.R.3d 1394, 1397 (1966).

[93] *See Spearin*, 248 U.S. at 137. Indeed, there is a well-developed body of contract law governing the relative duties of the owner and the contractor as they relate to the plans. *Compare id. with, e.g.*, R.M. Hollingshead Corp. v. United States, 111 F. Supp. 285, 286 (Ct. Cl. 1953) (holding that a contractor cannot follow plans that the contractor knows, before bidding, are defective and "make a useless thing and charge the customer for it"); Newsom v. United States, 676 F.2d 647, 649 (Ct. Cl. 1982) (stating that, in bidding, contractor must question "patent ambiguitie[s]").

[94] *See infra* part III.B.

[95] In Lundgren v. Freeman, 307 F.2d 104, 117 (9th Cir. 1962), a suit for wrongful termination of a prime contract, the court, applying Oregon law, saw "no reason for adding another remedy against architects, at least where the judgment against [the owner] is not uncollectible. This rule, we think, applies whether [the] architects' actions were intentional, negligent or merely erroneous."

[96] *Cf.* Annotation, *Liability of Contractee in Construction Contract for Delay Resulting in Consequential Damages to the Contractor*, 91 L.Ed. 48, 68 (1946); *see* Bagwell Coatings, Inc. v. Middle S. Energy, Inc., 797 F.2d 1298, 1302-06 (5th Cir. 1986)

obligations are the duty to cooperate with the contractor when cooperation is necessary and the duty not to hinder the contractor's performance.[97]

III. CENTRAL PROBLEMS WITH NEGLIGENCE LIABILITY

Thus far, it appears that a tort action in negligence is redundant in light of a contractor's contract remedies. If this were the only problem, one might conclude that this is no more than one of the law's inelegant moments.[98] However, negligence liability raises difficulties beyond a lack of doctrinal purity. In several significant ways, the intrusion of tort principles leads to inefficient and otherwise undesirable results. These undesirable results would be less likely if the issues were instead resolved by reference to contract law. Before examining these specific problems, however, it is necessary to lay some groundwork.

To allow a contractor to recover in negligence from an architect is the equivalent of including the following clause in the contracts between the owner and the architect and between the owner and the contractor: "The parties hereby agree that the architect shall be liable to the contractor when the architect's negligence increases the contractor's costs of building the project." Is this a contract term that rational owners, architects, and contractors want?[99]

(finding that an agent was not liable for the owner's breach of a contract provision).

[97] *See supra* notes 95 and 96. If the architect's control over the contractor proves too onerous and is in breach of the owner's contract with the contractor, the contractor need not wait until the conclusion of the project to seek redress, even absent an express contractual mechanism for resolving mid-job disputes. *See* SIEGFRIED, *supra* note 5, at 145-47. A material breach entitles the nonbreaching party to terminate the contract and seek damages. Hence, the court's concern in *Rogers & Rogers* with the architect's control, *see supra* note 27 and accompanying text, is adequately addressed by contract principles. *See infra* part III.B.

[98] *See* Bishop & Sutton, *supra* note 6, at 358-59 ("If C [e.g., the architect] cannot be sued by anyone, then the law is not efficient. But that is not the law since C can be sued by B [e.g., the owner]. So A [e.g., the contractor] can enforce his claims by threatening to sue B, who passes liability back to C. There is no harm in allowing A a direct suit in tort against C, so long as C can plead any contractual defenses he might have against B, such as terms exempting or limiting liability. Such combined contract and tort liability is inelegant, but harmless."). I would agree that C's ability to plead contractual defenses goes a long way toward avoiding problems raised by the introduction of negligence liability. *See infra* parts III.A. and C. It would not, however, eliminate all problems. *See infra* part III.B.

[99] *See, e.g.*, Bishop, *supra* note 90, at 243 (recognizing that a principal feature of contract and tort law is the articulation of agreements that the parties would have created themselves were the terms not too costly to negotiate).

To answer this question, it is useful to view the architect as selling the owner a package of services, which includes design work, other work, and insurance (for the benefit of the owner and perhaps others) against the inadequacy of her work.[100] Axiomatically, a rational owner will want the architect to provide the insurance when the benefits exceed the costs: that is, when it is in the interest, *ex ante*, of the owner as purchaser of architectural services. It is in the owner's interest, *ex ante*, if before contracting and without knowing whether a problem will arise, the owner would want the architect to assume liability, knowing that in the long run architects must cover their costs.

Likewise, a contractor can be viewed as selling the owner a package of services that may include insurance against the inadequacy of architectural work. If a contractor cannot recover for damages caused by an architect's mistakes, the contractor will price that risk into its contract. Again, a rational owner will want this insurance when the benefits exceed the costs: when it is in the interest, *ex ante*, of the owner as purchaser of construction services, knowing that in the long run contractors must cover their costs, including harm caused by architectural error.

An owner must pay for architectural error one way or another: the owner can either purchase insurance from the architect for the benefit of the contractor, or the contractor can insure and charge the owner, or the owner can self-insure and hold neither the contractor nor the architect responsible. Owners who pay for the insurance surely want the cost of that insurance minimized. Similarly, architects and contractors want the cost kept as small as possible so that they do not suffer an unnecessary increase in the price of their services.[101] In this way, efforts to minimize the cost of insuring against architectural error work toward an efficient result.[102]

In three notable instances discussed in the following sections, negligence liability can frustrate efforts to minimize the cost of insuring against architectural error.[103] In evaluating these issues, consider this

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[100] *See* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 66 (1987) (stating that insurance is an important component of liability).

[101] Naturally, *ex post*, contractors want to recover damages and architects wish to avoid paying damages. This is hardly the perspective, though, that ought to guide the development of rules to govern behavior prospectively.

[102] The result is efficient in an *ex ante* Pareto-superiority sense. That is, the owners can be made better off (by paying lower insurance premiums) and neither architects nor prime contractors are made worse off. By definition, architects and prime contractors will price the cost of whatever liability rule is chosen into their contracts and be fully compensated.

[103] Viewed one way, these instances demonstrate the effects that varying the locus of

phrasing of a hypothetical contract provision imposing negligence liability on the architect:

> The contractor may rely on the architect to use reasonable care in preparing the plans and specifications and undertaking the architect's other duties set forth in the owner-architect contract. The architect shall be liable to the contractor when the architect's failure to use reasonable care increases the contractor's costs of building the project.[104]

A. Delay Damages

Negligence liability can frustrate efforts to minimize the cost of insuring against architectural error because allowing a contractor to rely on the owner's architect can give the contractor an insufficient incentive to guard against certain potential damages, specifically, what are commonly termed "delay damages." Stated differently, negligence liability ignores the need for the contractor to take steps to reduce the magnitude of harm that may flow from architectural error.[105]

Suppose, for example, that a group decides to build a church and enters into a design-build, fixed-fee contract with a firm. Under this contract, a single firm agrees to take the project from beginning to end for a stated price: it will work up a design for the project, prepare the plans and specifications, and construct the church. Assume further that the firm will do all of the work with its own forces. By definition, then, costs are fully internalized. The firm is completely responsible for architectural (and all other) errors and works under the obvious need to minimize the total cost of architectural mistakes during the life of the project. Because the firm bears all such costs, the usual problems with placing incentives in the right places are absent.

In the design-build example, assume the church sanctuary was to have an elaborate skylight, to remind worshipers that they are always under

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liability can have where transaction costs are positive. *See* Ronald H. Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1, 6-7 (1960); Harold Demsetz, *Wealth Distribution and the Ownership of Rights*, 1 J. LEGAL STUD. 223, 224-29 (1972).

[104] *See supra* note 99 and accompanying text.

[105] Externalizing costs in this manner presents a common moral hazard problem. *See* Bishop, *supra* note 90, at 247; *see also* Charles J. Goetz & Robert E. Scott, *The Mitigation Principle: Toward a General Theory of Contractual Obligation*, 69 VA. L. REV. 967, 970 (1983) (suggesting that the state should offer standard preformulated contract options with known consequences, which would allow the parties to select the legal obligations best suited to their situation).

God's watchful eye. After the skylight was constructed, the firm realized that the skylight materials specified by the firm's architectural division were unsuitable, would leak, and thus had to be removed and replaced with different materials. As a result, the following "direct" costs were incurred: the labor to remove the old skylight materials, the replacement materials, and the labor to install the new materials. In addition, the unanticipated work occasioned by the error disrupted the construction schedule and had "delay" effects. Interior work had to be put off during the two weeks during which skylight repairs were underway, rendering some workers and equipment idle. The project was finished late, creating a need for workers to staff the project after it was to end, causing the firm's next project to get off to a late start, and causing the firm to lose business. The price of some materials rose, and overhead costs, such as financing, also increased.[106]

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[106] *See* Suemik Company, Ltd., CONSTRUCTION DELAY CLAIMS SEMINAR MANUAL (1986), which contains materials targeted to a national audience of construction lawyers. This source describes the following common elements of delay damages claims:

[a] "Extended general conditions." These include "personnel costs for project managers and other similar project administrative personnel; costs of additional utility charges for heat, light, and water; additional costs for maintenance; additional costs for facilities such as temporary storage facilities or office trailers; communications charges; and additional security charges." *Id.* at 79.

[b] "Home office overhead." During a period of delay, "fixed overhead and general and administrative expenses will continue to be incurred, but there will be a reduced amount of direct costs to which these expenses can be charged. The result is an amount of overhead that is 'unabsorbed' and which can be said to be attributable to the delay." *Id.* at 85.

[c] "Idle labor and equipment." *Id.* at 91.

[d] "Reduced productivity." Delay "reduce[s] the productivity of a contractor's labor and equipment. The lost productivity may take the form of reduced efficiency due to reduced production or working during adverse weather conditions." *Id.* at 92.

[e] "Escalation." This includes "[c]ost increases due to work performed in a later period than anticipated . . . [such as] increased *rates* for material, labor, or equipment." *Id.* at 101.

[f] Other costs, including lost opportunity, cost of experts to prove the delay claim, lost investment capital, testing and laboratory costs, lost revenue, lost reputation, and interest on retainage money held by the owner. *Id.* at 102.

[g] "Increased costs due to acceleration." *Id.* at 102. This can include the need to "hire additional men, work overtime, accelerate material delivery schedules, add additional supervision, and use additional equipment." *Id.* at 135.

In advance of the design problem, how would the design-build firm confront these potential costs? Consider first the delay costs. A disruption in the project's schedule (whatever the cause) can strain a firm's productive capacity in one of two ways: first, by creating idleness during the period of delay and, second, by requiring work to be performed at an unscheduled time. Essentially, a delay claimant argues that she was damaged because she could not perform work when she had planned on performing it. Consequently, the impact of delay can be moderated by reducing reliance on a delay-free job. In other words, the firm can decrease potential delay damages by retaining more flexibility in its general productive capacity.[107]

Now, contrast the direct costs. By definition, the work occasioned by the problem at hand was unanticipated. The firm must purchase more materials and employ additional labor to perform the unanticipated work. It is important to recognize that other than avoiding the mistake in the first place, a firm can do little to reduce these costs. Reducing reliance on the description of the project would be quite difficult for a firm. Stated differently, it is impractical for a firm to retain much flexibility concerning most particulars of the project that it is to build. To anticipate just what extra material and labor might be needed would be a complex undertaking, and much of the cost must be incurred anyway. There may be little savings and much waste in stocking specialized materials and labor in anticipation of extra work.

Although a firm cannot anticipate which errors will occur, it can expect problems occasioned by architectural mistakes to arise. Without knowing what the mistakes will be, some consequential costs–the costs which are more particular and mistake or project specific–cannot be reduced significantly, while other consequential costs–the more general–can be. The point to be made is that many delay costs fall into the latter category.

While a firm must rely on the description of a project, no firm relies on a delay-free job. A contractor always anticipates some delay. Suppliers inevitably supply late; equipment is not always up and running; all workers are not well and able all days; the weather is not always

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See also Bates & Rogers Constr. Corp. v. Greeley & Hansen, 486 N.E.2d 902, 905-06 (Ill. 1985) (detailing the elements of a delay damages claim).

In addition to the reasons discussed in the text, it may be desirable to avoid delay damage claims because the governing legal standards are so vague as to invite contractors to press questionable claims. *See infra* part III.C.

[107] The possible elements of a delay damages claim described *supra* note 106 illustrate that delay damages relate to strains on the firm's general productive capacity.

accommodating. Thus, a contractor must always maintain some flexibility in its productive capacity and in a project's schedule.

Notably, parties generally place much of the risk of delay on the contractor, which suggests that the costs of delay can be effectively reduced by the contractor. For instance, a typical contract provides that a *force majure* that delays the project entitles the contractor to a corresponding extension of time, but to no other relief.[108] Such a clause relieves the contractor from liability to the owner for a late job[109] but does not allow the contractor to pass its delay costs to the owner. Also common are "no damage for delay" clauses, under which the contractor cannot recover for a delay caused by the owner.[110] Under these contract provisions, a contractor knows it must be able to absorb idleness and have the capacity to finish a prolonged project. A contractor can offer a lower price if such clauses are omitted and the owner agrees to underwrite the expenses of delay. Such arrangements suggest, therefore, that requiring the contractor to absorb delay expenses costs the owner less.[111] Design error is just one cause of delay. Incentives to avoid delay

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[108] *See, e.g., AIA General Conditions, supra* note 91, at Article 8.3.1.

[109] This allocation of risk touches on the parallel question of how best to reduce the cost of insuring against delay damages suffered by the owner.

[110] A typical "no damage for delay clause" reads:

> Should the Contractor be delayed in the commencement, prosecution or completion of the Work by the act, omission, neglect or default of the [Architect,] Manager, Owner and/or of anyone employed by the [Architect,] Manager, Owner, or of any other contractor or subcontractor on the Project, or by any damage caused by fire or other casualty . . . then the Contractor shall be entitled to an extension of the time only, such extension to be for a period equivalent to the time lost . . . .

John E. Green Plumbing & Heating Co. v. Turner Constr. Co., 500 F. Supp. 910, 911 (E.D. Mich. 1980). For several alternative formulations, see SIEGFRIED, *supra* note 5, at 39, 150, 236. *See also* Comment, *The Enforceability of "No Damage for Delay" Clauses in Construction Contracts*, 28 LOY. L. REV. 129, 129 n.3 (1982).

[111] Even so, owners must determine how much delay a prime contractor should be required to absorb. Maintaining flexible productive capacity comes at some expense; the more flexible, the more expensive. No doubt owners will not want to pay contractors to maintain absolutely flexible productive capacity. For instance, the owner may not want the contractor to retain the flexibility necessary in order to be able to cope with remote but catastrophic events. *See* Victor P. Goldberg, *Impossibility and Related Excuses*, 144 J. INST. AND THEOR. ECON. 100 (1988), *reprinted in* READINGS IN THE ECONOMICS OF TORT LAW at 221-24 (Victor P. Goldberg ed., 1989); Richard A. Posner & Andrew M. Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. LEGAL STUD. 83 (1977).

Courts have dealt with this issue by refusing to enforce a no damage for delay clause in certain circumstances. *See, e.g.*, E.C. Ernst, Inc. v. Manhattan Constr. Co. of Texas,

aside, there is no reason to treat delay caused by an architect's error differently from delay created by unusually heavy and frequent thunderstorms.

Creating the right incentives in order to avoid errors that cause delay is important. Delay is costly, and in the long run owners must also pay for these delays in terms of increased costs.[112] To allow the contractor to recover delay damages does not provide the contractor with any incentive to reduce them. However, to require the contractor to absorb the costs of delay caused by architectural error may give the architect too little incentive to take care.[113]

Confronting an architect with the consequences of sloppy work in ways other than liability for a contractor's delay damages may be a possibility. Substantial, albeit imperfect, incentives are likely to exist. First, liability for the other "direct" costs, like the labor and material to replace the skylight in the preceding example, can provide an important incentive. Second, the architect might face liability for the owner's delay damages, perhaps in a liquidated amount.[114] If architects are liable for such costs, sloppy architects will pay higher insurance premiums and thus be at a competitive disadvantage.

The architect's reputation may also provide substantial incentives. An architect known for shoddy work cannot charge as much for its services. Viewed one way, an architectural firm engages in activities in order to enhance the value of its brand name and then rents the brand name with its services to owners.[115] If an architectural firm tarnishes its reputation,

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551 F.2d 1026, 1029 (5th Cir. 1977). "[C]ourts will . . . generally enforce [clauses relieving one party from damages for delay caused by that party] absent delay (1) not contemplated by the parties under the provision, (2) amounting to an abandonment of the contract, (3) caused by bad faith, or (4) amounting to active interference." *Id.*; *see also* Comment, *The Enforceability of "No Damage for Delay" Clauses in Construction Contracts*, *supra* note 110, at 131. This doctrinal formulation thus addresses problems of both adverse selection and moral hazard. *See* Bishop, *supra* note 90, at 246, 252-54.

[112] Ideally, but perhaps impractically, the contractor could reduce potential delay damages to their minimum, quantify and identify them in the contracts, and hold the architect liable for that amount. Such an approach has other advantages: it aids planning and eliminates any need to determine (or argue about) the actual cost of delay. *See, e.g.*, Robert Cooter, *Unity in Tort, Contract and Property: The Model of Precaution*, 73 CAL. L. REV. 1, 27 (1985).

[113] *See* Bishop, *supra* note 90, at 261-64 (suggesting that in order to eliminate this moral hazard problem, legal doctrine ought to require care by the party who suffers a loss).

[114] For instance, if the project is to be leased to a third party on completion, the architect might be liable for any penalties in the lease tied to late delivery of the building.

[115] *See* Goldberg, *supra* note 42, at 302.

the value of its brand name is reduced, and its future revenues will decline.[116]

The extent to which the architect's reputation will serve as a check on substandard work depends on the quality and availability of information regarding the architect's past performance. If information were typically poor or seldom available, the incentive to work carefully would decline and an adverse selection problem might develop: firms that spent resources to enhance the value of their brand names would be at a competitive disadvantage because they would increase their operating costs without realizing a commensurate return. However, information in the market may be good. Some owners will be repeat players, as will many lenders, construction managers, contractors, and performance bond sureties.[117]

In the end, a sensible owner could decide that to provide the contractor with an incentive to reduce delay damages is more important than to provide the architect with an extra incentive to avoid causing delay. A sensible owner could also, however, conceivably decide the opposite. No doubt the decision will vary from relationship to relationship and from project to project, or even from phase to phase within a project. The central point is this: the variable and contingent nature of these issues illustrates precisely why contract principles are better suited than tort principles for resolving them.

Forms provided by the American Institute of Architects ("AIA") apparently reflect the judgment that it is more important to give the architect an incentive to take sufficient care than it is to give the contractor an incentive to reduce potential delay damages.[118] The AIA contract forms entitle the contractor to an extension of the contract time to perform the work if delayed by any act of the owner or the owner's architect.[119] Importantly, the contractor may also sue the owner, or anyone else, for delay damages.[120]

Recognition of a tort action in negligence can frustrate efforts to resolve these problems by contract. Indeed, it is tempting to speculate that

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[116] *Id.*

[117] *Id.* at 303.

[118] The term "apparently" is used because perhaps the AIA forms reflect the judgment that a contractor's waiver of tort claims against the architect will not necessarily be enforced and is therefore not worth the reduction in architectural fees that owners might demand if such a provision were included. Moreover, the AIA documents have gone to great lengths to reduce the likelihood that architects will be held liable for any damages under a theory of negligent supervision. *See infra* notes 140-47 and accompanying text.

[119] *AIA General Conditions*, *supra* note 91, at Article 8.3.1.

[120] *Id.*

tort remedies are often pursued precisely in an effort to avoid a recovery-limiting contract provision, such as a "no damage for delay" clause.[121]

B. Reliance on the Architect's Supervision

Another problem with negligence liability is that a court-imposed provision allowing the contractor to rely on the architect can embody a misperception of the nature of many supervisory tasks set forth in the owner-architect contract. To decide that the contractor can rely on the architect to perform a certain task with due care is equivalent to a contract term which requires the architect, not the contractor, to perform the task. Tort law simply has no place in deciding which tasks ought to be assigned to the architect and which should be assigned to the contractor. Rather, the question should be which tasks did the contracts assign to which parties.[122] Thus, without regard to the problem of delay damages, negligence liability is also problematic because it can allow the contractor to rely on the architect in circumstances where the parties agree (or would agree) that the contractor should rely on itself.

The application of negligence principles may often reach the wrong result by concluding, essentially, that the parties have assigned a task to the architect when, in fact, they have assigned it to the contractor. Consider the fact that an owner may have various reasons to police the contractor. Some deviations are difficult to detect in the finished job.[123] Moreover, remedying faults in a completed job can be too expensive to justify. Tearing down a completed building worth $5 million in order to remedy a defect that decreases its worth by $1 million constitutes waste. The law does not require the contractor to remedy such defects, yet, presumably, the owner would rather have the building built as planned than receive a $1 million damage payment.[124] Even when a contractor

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[121] *See* William K. Jones, *Economic Losses Caused By Construction Deficiencies: The Competing Regimes of Contract and Tort*, 59 U. CIN. L. REV. 1051, 1097 (1991) (suggesting that this is the probable motivation).

[122] *But cf.* Note, *Architectural Malpractice: A Contract-Based Approach*, 92 HARV. L. REV. 1075, 1102 (1979) ("Once the parties' obligations and expectations are determined [by reference to the contract obligations and standards of care], a tort analysis may be constructed–the scope of the architect's duty to act being determined by reference to the contract and its modification by conduct, the foreseeability of injury depending on the reasonableness of the plaintiff's reliance on the architect's performance.").

[123] In the same vein, the owner will want to make sure that the contractor is performing the work for which he receives progress payments during the course of the project.

[124] *See* W.M. Moldoff, Annotation, *Cost of Correction or Completion, or Difference*

is required to correct his mistakes, owners may hesitate to rely too heavily on a member of a group notorious for thin capitalization, particularly given the specter of premises liability.[125] Thus, the owner has a significant need for someone other than the contractor to inspect ongoing work. An obvious choice is the architect, who is already familiar with the plans and specifications and who historically has filled this role.

Inspections undertaken to police the contractor, however, are not intended to substitute for the contractor's duty to ensure that the project is built in compliance with the plans and specifications. Such inspections may well be superficial. Even when an architect's inspections are more detailed, to allow the contractor to recover from the architect is problematic in that it can create a conflict of interest between the owner and the architect.

The owner has hired the architect to protect its interests by inspecting the work, yet negligence law can step in to require the architect to consider the interests of the contractor, perhaps to the detriment of the owner's interests.[126] Moreover, to relieve the contractor of its obligation to comply with the plans by allowing it to rely on the architect's assessment of its work may simply effect a transfer of wealth from the architect to the contractor.[127] If the contractor is contractually obligated to rely on itself, the owner realizes no savings when the law permits the contractor to rely on the architect. *Ex ante*, the owner already compensated the contractor for undertaking the work.[128]

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in Value, as Measure of Damages for Breach of Construction Contract, 76 A.L.R.2d 805 (1961) (collecting cases that delineate circumstances where the owner cannot insist on strict compliance with the plans and specifications but must instead accept deviations if economic waste would otherwise result).

[125] "Historically, the liability of a possessor of land to one injured thereon was treated as a branch of tort law, or more specifically, in the context of negligence. However, as the amount of litigation . . . has increased exponentially, there has developed a separate branch of the law, sometimes referred to as 'landowner's and occupier's liability,' or more generally 'premises liability,' which particularizes the rules applicable to injuries occurring on the property of the owner or occupant–that is, on his premises."

62 AM. JUR. 2d *Premises Liability* § 1 (1990). Hence, even a contractor's performance bond may be inadequate financial protection.

[126] *See* Jones, *supra* note 121, at 1094-96. *But see* Bagwell Coatings, Inc. v. Middle S. Energy, Inc., 797 F.2d 1298, 1309-12 (5th Cir. 1986) (finding that an agent must breach some contract obligation to the owner before the agent is liable to a third party for negligence).

[127] At the least, the contractor is given the benefit of insurance against the inadequacy of the work.

[128] Moreover, on the next job, an architect will price the risk of liability into its

The problems raised by the intrusion of tort principles are particularly acute in cases alleging negligent supervision. Consider again the *Rogers & Rogers*[129] case and the architect who approved defective concrete that was then incorporated into the skeleton of the building.[130] The contractor was allowed to bring a negligence action against the architect to recover the costs of replacing the skeleton and to recover delay damages.[131] An examination of these facts under contract principles either leads to a superior remedy for the contractor or demonstrates that the case was wrongly decided.

Assume that the contract documents in *Rogers & Rogers* made clear that the architect was required to interpret tests of the concrete and decide whether the concrete met the contract specifications.[132] If that were true, then the question should be whether the parties intended the contractor to rely on the architect or whether the parties also intended the contractor to satisfy itself that the concrete met contract specifications.[133] In other

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contract with the owner. Even if the owner can then extract some savings from its contractor, the owner is compelled to purchase services or insurance from the architect that it did not otherwise want. *See* Jones, *supra* note 121, at 1096.

[129] 161 F. Supp. 132 (S.D. Cal. 1958).

[130] *See supra* notes 19-27 and accompanying text.

[131] *Rogers & Rogers*, 161 F. Supp. at 136.

[132] *Id.* at 134-36.

[133] A Texas intermediate appellate court sharply criticized both *Rogers & Rogers* and *Moyer* for ignoring the architects' contractual roles in finding a general duty based on the architects' supervisory power.

> The sum and substance of [the criticized position is]:
>
> All architects control the work of the contractor; [the defendant] is an architect; therefore, [the defendant] controlled the contractor's work . . . .
>
> From the control so deduced, [plaintiff] urges this Court to make the legal determination that a duty should be placed upon [the defendant] and architects generally, based perhaps upon . . . social, economic, and moral grounds . . . .
>
> . . . .
>
> . . . [But] [a]ny such rule of general application, based upon an assumed general control of the architect over the contractor, must invariably result in an injustice in a particular case when the contract assigns no control to the architect with respect to a particular aspect of the contractor's work wherein the injury occurs, but the architect is, nevertheless, held to a general duty said to be founded upon and justified by the existence of his power over the contractor.
>
> . . . [Even where the architect is given such power by contract,] the bedrock questions remain: did the contracting parties assign such plenary power to the architect for the benefit of the owner only or for both contracting parties; or, should a duty of care be imposed upon the architect in favor of the contractor notwithstanding the intentions of the contracting parties?

Bernard Johnson, Inc. v. Continental Constructors, Inc., 630 S.W.2d 365, 373-74 (Tex. Ct. App. 1982). Nevertheless, the Texas court left open the possibility that some owner-

words, the question is whether the parties intended for the architect's duty to decide whether the concrete met the contract specifications to supersede the contractor's duty to supply satisfactory concrete.[134] Negligence liability represents a judgment that it was the architect's, not the contractor's, ultimate responsibility to perform the given task. If the inquiry is squarely within the regime of contract, however, the question should be decided according to the intent of the parties and principally by reference to the contract documents and the course of conduct. As the foregoing discussion illustrates, the answer to this question may be more difficult than courts have traditionally recognized and may be contrary to the conclusions that courts have reached under negligence principles.

If the parties intended for the architect's duty to supersede the contractor's, then contract law relieves the contractor of liability for the architect's mistake. Indeed, contract law gives the contractor a remedy superior to the tort remedy in *Rogers & Rogers*. When the contractor constructed the skeleton in accordance with the architect's approval, the contractor satisfied its contractual duty. When the contractor performs additional remedial work, it is entitled to be paid for that work, regardless of whether the architect's erroneous approval was negligent or occurred despite the utmost care.

If, on the other hand, the parties did not intend for the contractor to rely on the architect, then *Rogers & Rogers* was wrongly decided. If the contractor decides to take a chance and rely on someone to perform its contractual duties, it should do so at its own risk.[135]

Interestingly, if one reverses the *Rogers & Rogers* facts and considers the case where the architect erroneously rejects the concrete, tort and contract law converge. Whether or not the parties intended the architect's duty to supersede the contractor's, the contractor would have a breach of

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architect contracts could give rise to a tort duty in favor of the prime contractor. *Id.* at 375.

Of course, imposition of such a general duty of careful supervision exaggerates the problems with negligence liability discussed in this section. In most cases, however, it is clear that the architect is held liable only for misperforming those supervisory duties set forth in the contract between the owner and the architect. *Id.* at 374. Although the architect's control has been a reason why courts have imposed liability for misperforming those supervisory tasks that the architect has contracted to do, it appears that presumed control has not been used to extend an architect's general duty to supervise. *Id.*

[134] *See supra* notes 123-29 and accompanying text for reasons why the owner may not want the architect's duties to supersede the contractor's responsibilities, despite the increased costs of such dual obligations.

[135] Compare *AIA General Conditions*, *supra* note 91, at Article 4.12.6 (The Contractor shall not be relieved from responsibility for errors and omissions by the Architect's approval thereof.).

contract action. By definition, the contractor would have satisfied its duty to perform the work according to the specifications. When the architect wrongly rejects the work, the architect has breached the owner's duty not to hinder the performance of the contractor.[136] Thus, when the contractor performs additional work, it is entitled to be paid for that work.[137]

Contractor recovery in the wrongful rejection case raises the conflict of interest problem mentioned earlier.[138] The owner's interest requires the architect to err on the side of avoiding wrongful approval; the contractor's interest requires the architect to err on the side of avoiding wrongful rejection. There is no simple (or costless) way to avoid this conflict of interest. Foreclosing contractor recovery would require the contractor to insure against wrongful rejection, an event over which the contractor lacks direct control. Nonetheless, however this dilemma should be resolved, contract rather than tort principles provide a framework within which the owner can confront the problem.

The AIA forms give the architect a minimal supervisory role consistent with a policing function. The architect's authority to act on behalf of the owner is limited only to specifically listed duties,[139] and the architect's duty to inspect ongoing construction is quite general.[140]

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[136] *See supra* notes 95-96 and accompanying text. This analysis assumes that the architect is acting as the owner's agent and not as an independent arbitrator of disputes between the owner and the contractor. *See* Bagwell Coatings, Inc. v. Middle S. Energy, Inc., 797 F.2d 1298, 1311 n.19 (5th Cir. 1986); *see also supra* note 5 (regarding a clause requiring cooperation from owner).

[137] Although the contractor must show that the architect should have approved the work in order to recover damages, the architect may be held to a higher standard of performance than ordinary care. *See infra* part III.C.

[138] *See supra* note 126 and accompanying text.

[139] *AIA General Conditions*, *supra* note 91, at Article 2.2.2.

[140] *Id.* at Article 2.2.3. Moreover, the architect's duty to take action on the prime contractor's submittals is limited to "conformance with the design concept." *Id.* at Article 2.2.14. Indeed, the prime contractor is relieved of responsibility for deviation from the plans and specifications of work submitted to and approved of by the architect only if the prime contractor specifically informs "the Architect in writing of such deviation at the time of submission and the Architect has given written approval to the specific deviation[s]. [However,] [t]he Contractor shall not be relieved from responsibility for errors or omissions . . . by the Architect's approval thereof." *Id.* at Article 4.12.6.

This level of responsibility applies to the architect's certification of the prime contractor's applications for progress payments. *See* Article 9.4.2. Indeed, by issuing a certificate for payment, the architect represents only that the certificate is consistent with the Article 2.2.3 site observations. Once again, significant inspection by the architect is disclaimed.

> [B]y issuing a Certificate for Payment, the Architect shall not thereby be deemed to represent that he has made exhaustive or continuous on-site

> The Architect will visit the site at intervals appropriate to the stage of construction to familiarize himself generally with the progress and quality of the Work and to determine in general if the Work is proceeding in accordance with the Contract Documents. However, the Architect will not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the Work. On the basis of his on-site observations as an architect, he will keep the Owner informed of the progress of the Work, and will endeavor to guard the Owner against defects and deficiencies in the Work of the Contractor.[141]

Further, the AIA contracts disclaim any responsibility on the part of the architect for the work,[142] including responsibility arising from the architect's right to reject work.[143] Concurrently, the prime contractor remains expressly liable for work that fails to conform to the plans or specifications, no matter what the architect does in performing the supervisory tasks set forth in the contract:[144]

> The Contractor shall not be relieved from his obligations to perform the Work in accordance with the Contract Documents either by the activities or duties of the Architect in his administration of the Contract,

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inspections to check the quality or quantity of the Work or that he has reviewed the construction means, methods, techniques, sequences or procedures. . . .

Id. at Article 9.4.2.

[141] *Id.* at Article 2.2.3.

[142] *Id.* at Article 2.2.4. Again the language is quite broad:

> The Architect will not be responsible for and will not have control or charge of construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work, and he will not be responsible for the Contractor's failure to carry out the Work in accordance with the Contract Documents. The architect will not be responsible for or have control or charge over the acts or omissions of the Contractor, Subcontractors, or any of their agents or employees, or any other persons performing any of the Work.

Id.

[143] *Id.* at Article 2.2.13, which states that no decision by the architect "to exercise or not to exercise [the] authority [to reject work] shall give rise to any duty or responsibility of the Architect to the Contractor." The supervisory obligations in the AIA's Standard Form of Agreement Between Owner and Architect are parallel. *Id.* at Document B141, Article 1, *Standard Form of Agreement Between Owner and Architect*, v. 3 The American Institute of Architects, HANDBOOK OF PROFESSIONAL PRACTICE (1977).

[144] *AIA General Conditions*, *supra* note 91, at Article 4.3.3.

> or by inspections, tests or approvals required or performed [by the Architect or other] persons other than the Contractor.[145]

In sum, the AIA documents attempt to make clear that the architect has not been hired to oversee the details of the contractor's work and that the architect's inspections are not meant to supersede the contractor's duties.[146]

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[145] *Id.*

[146] Indeed, in response to judicial imposition of negligence liability, the AIA documents often have been modified precisely to attempt to make this point clear. As the prefatory remarks to the *AIA General Conditions* state:

> In its current edition (Thirteenth Edition, August 1976) [the General conditions] represent a consensus of leaders in the construction industry, resulting from approximately 90 years of review, application, and testing in practice and in the courts.
>
> . . . .
>
> [T]he Eighth Edition, published in 1961, resulted largely from the construction industry's concern over the steadily increasing number of uncertainties and disputes concerning liability and professional responsibility. [In the Eighth Edition] . . . the term "observation" was first used in place of "supervision" . . . .
>
> The Ninth Edition, issued in 1963, clarified the status and responsibilities of the Architect during the Construction Phase of the Project, particularly with respect to the oft-misused term "supervision," due to the difficulties of non-architects in understanding the limited nature of the Architect's supervisory function, despite a clear definition of the term in the documents.
>
> The Tenth Edition, in 1966, constituted the largest reorganization . . . [N]ew definitions were added . . . [and] Contractor's responsibilities for detailed supervision of the Work, for construction means, methods, techniques, sequences and procedures, and for safety were established. . . .
>
> . . . .
>
> During three years of experience in using the Eleventh Edition, and as a result of deliberations with construction industry representatives and legal counsel and insurance counsel, certain desirable improvements became apparent . . . . Due to legal interpretations which subjected the Architect to unwarranted liability, the provision which allowed the Architect to stop the Work was deleted [in the new edition]. This provision had been intended to enable the Architect to prevent the construction of further defective Work. [However,] [t]he courts interpreted it as placing a duty on the Architect to anticipate defects in construction which might subsequently result in injury, and to use the power to stop the Work to prevent possible injuries. . . .
>
> . . . .
>
> The Twelfth Edition had a full four years of use prior to the start of review proceedings by AIA's Documents Board in preparation for the Thirteenth Edition. The initial intent was to modify only those provisions which experience and use indicated were necessary, including provisions affected by court decisions. . . .

C. *The Standard of Architectural Performance*

When the contractor is allowed to rely on the architect, should it only be so long as the architect takes due care? That is, when the architect insures, should it be against negligent failure, or just failure?

If the architect is liable only for her negligence, she insures against error only to the point at which she has failed to take due care. Because strict liability for error will not result in more care by the architect,[147] the question becomes who should insure against errors that cannot be avoided cost effectively.[148]

Placing liability on the architect for all errors has a significant advantage: it eliminates disputes over the quality of the architect's performance. Negligence liability imports a vague standard of architectural care. To insure against an architect's negligence (as opposed simply to an architect's errors) is costly, because defining the scope of insurance is difficult. *Ceteris paribus*, the clearer the terms of the obligation, the lower the costs of arguing over its reach.[149] The ambiguity reduces the benefits of the insurance to the contractor, while the indeterminate scope of the duty to use due care invites litigation and thereby increases the owner's costs. As a result, sensible owners may well prefer the architect to insure against all errors, period, and not just against negligent error.[150]

This ultimately devolved into a total and major update of the document within the existing framework.

1 AMERICAN INST. OF ARCHITECTS, HANDBOOK OF PROFESSIONAL PRACTICE, ch. 13, *Preface to General Conditions to the Contract of Construction*, at 3-4 (1977).

[147] *See* LANDES & POSNER, *supra* note 100, at 64-65.

[148] This decision is independent from the decision whether to compensate the contractor for delay damages. Negligence would be a very clumsy way of addressing the delay damages issue.

[149] *See generally* Gordon Tullock, *Efficient Rent Seeking*, *in* READINGS IN THE ECONOMICS OF CONTRACT LAW (Victor P. Goldberg ed., 1989) (discussing the social costs of negotiations).

[150] For these reasons, the owner may not want to relieve the architect from liability, even in situations in which the contractor should have discovered the error. It seems very unlikely, however, that the architect could take less care because it would not face liability for its most egregious errors. Nevertheless, an owner must decide whether giving the contractor an incentive to report obvious architectural errors is sufficiently worthwhile to justify injecting uncertainty over the scope of the architect's obligation. One factor to consider would be the contractor's other incentives to identify error, such as a "no damage for delay" clause.

Courts have found that tort liability does not incorporate contractual standards of care. In one example, a federal district court expressly held that a supervising engineer owed a contractor a duty to use "care and competence commensurate with the standards of his profession in obtaining and communicating information for the guidance of" the contractor.[151] The court rejected the suggestion that the engineer should be bound, vis a vis the contractor, to the higher standard of care to which the engineer was bound by its contract with the owner.[152]

If the contractor is permitted to rely on a certain level of architectural competence, such competence should, at the least, be the level of care set out in the contract. This would certainly be the result that sensible contracting parties would reach. An owner would not explicitly allow a contractor to rely on the architect and simultaneously temper that reliance by reference to a level of architectural care lower than the level specified in the owner-architect contract, for then the owner could not extract as much of a discount from the contractor, even though the owner had already paid the architect for the higher quality services. Additionally, disputes would be muddied, because the architect's performance would have to be judged by two different standards of performance (often within a single lawsuit), depending upon the identity of the claimant.

D. Common Arguments in Favor of Negligence Liability

Two arguments are typically made in support of allowing a direct action by a contractor against an architect even absent an express

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The AIA contracts state that the contractor is not liable for defects in the plans, specifications, or other design work, but must report discovered error.

> The Contractor shall carefully study and compare the Contract Documents and shall at once report to the Architect any error, inconsistency or omission he may discover. The Contractor shall not be liable to the Owner or the Architect for any damage resulting from any such errors, inconsistencies or omissions in the Contract Documents.

AIA General Conditions, *supra* note 91, at Article 4.2.1.

[151] Peter Kiewit Sons' Co. v. Iowa S. Util. Co., 355 F. Supp. 376, 394 (S.D. Iowa 1973) (citing Ryan v. Kanne, 170 N.W.2d 395 (Iowa 1969), which held that an accountant was liable in negligence to a third party, who the accountant knew would rely on the accountant's work).

[152] *Id.*; *see also* E.C. Ernst, Inc. v. Manhattan Constr. Co. of Texas, 551 F.2d 1026, 1032 n.14 (5th Cir. 1977) (finding a tort duty independent of the contractual standard of care); Berkel & Co. Contractors, Inc. v. Providence Hosp., 454 So. 2d 496, 502 (Ala. 1984) (stating "that contracts may impose greater or lesser degrees of responsibility and that third parties are generally not entitled to benefit from contract standards which differ from the standard of care generally applicable in negligence actions").

contractual provision providing for one: simplifying litigation and owner insolvency. In theory, to allow the contractor to sue the architect could eliminate an unnecessary party from the claim. For example, if the owner warranted the plans and specifications to the contractor, and the architect gave the same warranty to the owner, allowing the contractor to sue the architect directly would be simpler than channeling the claim through the owner.[153] To the extent that simplifying litigation is the goal, however, negligence liability is a cumbersome mechanism. The owner, no doubt the party most interested in simplifying the matter by stepping out of it, can assign its rights against the architect to the contractor, either in the owner-contractor contract or at some later time. Moreover, negligence liability only presents the *possibility* of simplified litigation. The contractor can still sue the owner in contract, and for strategic reasons may choose to do so, thus keeping all three parties involved. Likewise, the contractor's claim against the architect may be only a relatively small part of a larger dispute over the project to which the owner, architect, and contractor are parties.[154]

Owner insolvency is, in effect, a case where postcontracting assignment may not be available. The issue, then, is whether the law should protect contractors who fail to protect themselves. If an owner pays for a warranty from the architect and gives one to the contractor, and neither the architect nor the contractor priced the risk of owner insolvency into their contracts, some inequity would exist as between the architect and the contractor.[155] The prevalence of mechanics' lien laws, however, makes owner insolvency something less than an acute prob-

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[153] *See* Jones, *supra* note 121, at 1096 (stating that channeling claims through the owner is desirable). On the broader subject of channeling claims for purely economic loss, one commentator states:

> [under] common-law economic-loss doctrines[,] . . . both recovery and nonrecovery for pure economic loss c[an] be explained by balancing the value of recovery, on the one hand, and both expected litigation and channeling costs on the other. Recovery is denied when expected litigation costs exceed the expected value of such recovery or the costs of channeling the losses through the party incurring physical damage.

Rizzo, *supra* note 6, at 310 (1982).

[154] Indeed, in such cases negligence liability actually complicates litigation by, among other things, confusing the parties' contractual duties and liabilities and interjecting a fault-based standard of architectural care.

[155] If, however, the parties took this risk into account when contracting, then they will have been fully compensated, *ex ante*.

lem,[156] and doctrinal alternatives[157] again make negligence liability a blunt tool.[158]

IV. CONCLUDING REMARKS

A contractor who seeks to recover purely economic loss caused by an architect's mistakes should be confined to contract remedies. A tort action in negligence against the architect is unnecessary. Unlike most personal injury cases, contract solutions for economic loss provide fully satisfactory remedial alternatives.

Indeed, the claims recognized in *Rogers & Rogers* and *Moyer* present a core case for the application of the economic loss rule. Simply put, the policies underlying the general prohibition against recovery of purely economic loss in negligence or products liability cases speak most directly to situations where the loss is confined to a small group whose relations are governed by extensive written contracts.

If contract remedies are adequate and negligence remedies are unnecessary, why then did the contractors seek *tort* relief in *Rogers & Rogers* and *Moyer*? The answer, no doubt, lies in the difference between this Article's conclusion that, *ex ante*, negligence remedies are unnecessary and the strategy of litigants, *ex post*, to seek recovery from any possible source. Perhaps the contractors wanted to maintain friendly owner-contractor relations.[159] Or, perhaps their lawyers simply felt better about their skills in presenting tort claims.[160] Or, perhaps most

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[156] *See* SIEGFRIED, *supra* note 5, at 61-80.

[157] For example, the law could fashion a narrow rule of constructive assignment in insolvency cases, or fashion a broader constructive assignment of the owner's contract rights, or deem the contractor a third-party beneficiary to the owner's contract with the architect. While there is substantial authority opposed to the third-party beneficiary theory, *e.g. Moyer*, 285 So. 2d 397, 402-03 (Fla. 1973), there is also substantial authority against negligence recovery for pure economic loss. Any of these alternative rules would entail less sweeping change than importing negligence principles. *Cf.* Schwartz, *supra* note 6, at 43-44 (arguing that the third-party beneficiary doctrine, not negligence, provides a better framework for analyzing the *J'Aire* case, in which a contractor's late completion of a remodeling project injured the owner's tenant). *See supra* note 65 for a sketch of the *J'Aire* case.

[158] See Goldberg, *supra* note 42, at 312.

[159] In the *J'Aire* case, for example, "the tenant's lawyer told the court [that] the tenant did not wish to upset its friendly relations with the building owner" by pressing its claim against the owner instead of the contractor. *See* Schwartz, *supra* note 6, at 41; *see supra* note 65 for a description of the *J'Aire* case.

[160] Schwartz, *supra* note 6, at 43.

likely, they wished to avoid a recovery-limiting contract provision, like a "no damage for delay" clause.[161]

The suspect nature of the reasons for seeking tort relief highlights the problems that importing negligence principles can cause. Negligence liability can force owners to underwrite the costs of construction delays when efficient incentives or the parties' contracts would place those costs on the contractor. In addition, liability for negligent supervision can give the architect a job that it didn't undertake and relieve the contractor of one that it did. Thus, negligence liability can result in the rewriting of the parties' bargain in favor of the contractor, but against the short-term interests of the architect (who is liable) and the owner (whose agent now faces conflicting obligations), and the long-term interests of everyone (who now encounter inflated construction costs). Finally, the often contentious issue of negligence will further complicate already complex construction disputes.

[161] *See supra* note 122.